UNITED STATES REPORTS

VOLUME 414

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

(BEGINNING OF TERM)

OCTOBER 9, 1973, THROUGH JANUARY 21, 1974

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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Errata

412 U. S. 475, note 7, line 3: "289 Ore. App. 295" should be "11 Ore. App. 289, 295."

412 U. S. 843, note 4, line 2 from bottom: the first comma should be deleted.

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
POTTER STEWART, ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.

RETIRED

EARL WARREN, CHIEF JUSTICE.
STANLEY REED, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT*

ELLIOT L. RICHARDSON, ATTORNEY GENERAL.[1]
WILLIAM B. SAXBE, ATTORNEY GENERAL.[2]
ROBERT H. BORK, SOLICITOR GENERAL.[3]
MICHAEL RODAK, JR., CLERK.
HENRY PUTZEL, jr., REPORTER OF DECISIONS.
FRANK M. HEPLER, MARSHAL.
EDWARD G. HUDON, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] Attorney General Richardson resigned effective October 20, 1973, on which date Solicitor General Bork became Acting Attorney General.

[2] The Honorable William B. Saxbe, of Ohio, was nominated to be Attorney General by President Nixon on December 10, 1973; the nomination was confirmed by the Senate on December 17, 1973; he was commissioned on January 4, 1974, and took the oath of office on the same date. He was presented to the Court on January 21, 1974 (see *post*, p. XI).

[3] The Honorable Robert H. Bork, of Connecticut, was nominated by President Nixon to be Solicitor General on January 4, 1973; the nomination was confirmed by the Senate on February 1, 1973; he was commissioned on June 19, 1973, and took the oath on June 26, 1973. He was presented to the Court on October 1, 1973 (see *post*, p. VII).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

PRESENTATION OF SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 1, 1973

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

Mr. Attorney General Richardson presented the Honorable Robert Heron Bork, of Connecticut, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you now assume, the duty of representing the Government before this Court in all cases in which the Government asserts an interest. Your commission will be duly recorded by the Clerk.

TRIBUTE TO MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

MONDAY, NOVEMBER 5, 1973

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

Before we hear the first argument this morning, we would like to take note for the permanent journal and records of the Court of an important event in the history of the Court.

One week ago today, on October 29, MR. JUSTICE DOUGLAS established a new longevity record for service on the Supreme Court of the United States; thirty-four years, one hundred and ninety-six days, as of that day.

His tenure as a Justice of this Court now exceeds that of Mr. Justice Stephen Field, who was appointed by President Lincoln, took his oath of office in 1863, on May 20, and remained on the Court until December 1, 1897.

I know I speak for all the members of the Court, and for the retired and former members of the Court, when we take this occasion to wish our Brother Douglas continued good health and long life and to record our congratulations on the new record which he has established and will proceed to break every day when he arrives at the Court in the morning.

PRESENTATION OF ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 21, 1974

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST.

Mr. Solicitor General Bork presented the Honorable William B. Saxbe, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded with the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

SATIACUM *v.* WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 72–552. Decided October 15, 1973

State courts should have determined where petitioner's alleged offenses occurred with respect to boundaries of present or former Indian reservation, since if they occurred outside those boundaries the State Supreme Court unnecessarily reached a federal question in deciding that the reservation as such had ceased to exist.

Certiorari granted; 80 Wash. 2d 492, 495 P. 2d 1035, vacated and remanded.

PER CURIAM.

It appearing that petitioner might have been fishing at a location outside the boundaries of what is, or was, the Puyallup Indian Reservation when the acts with which he is charged were committed, and, if this were so, that the Supreme Court of Washington then unnecessarily addressed, and determined, the federal question whether the Puyallup Reservation "has ceased to exist," the petition for a writ of certiorari is granted, the judgment of the Supreme Court of Washington is vacated, and the case is remanded to that court for resolution by the state courts of the factual issue whether the alleged offenses took place outside the boundaries of what is, or was, the Reservation.

PLUMMER *v.* CITY OF COLUMBUS

ON APPEAL FROM THE COURT OF APPEALS OF OHIO FOR FRANKLIN COUNTY

No. 72-6897. Decided October 15, 1973

The Ohio Supreme Court erred in finding no constitutional infirmity in the lower court's holding that a city ordinance punishing abuse of another by using menacing, insulting, slanderous, or profane language might constitutionally reach appellant's use of "fighting words," where the ordinance, as construed by the Ohio courts, is facially unconstitutional because it may be applied to punish not only unprotected but also protected speech. Even though a law may be valid as applied to the conduct charged against a particular defendant, he may raise its vagueness or unconstitutional overbreadth as applied to others, and, if the law is found deficient in one of these respects, it may not be applied to him either, absent a satisfactory limiting construction.

Reversed.

PER CURIAM.

The Court of Appeals of Franklin County, Ohio, in an unreported opinion, affirmed appellant's conviction of violating Columbus City Code § 2327.03, which provides: "No person shall abuse another by using menacing, insulting, slanderous, or profane language." The Ohio Supreme Court, in an unreported order, *sua sponte* dismissed appellant's appeal to that court "for the reason that no substantial constitutional question exists herein." We grant leave to proceed *in forma pauperis* and reverse.

On December 11, 1972, we held that *Gooding* v. *Wilson*, 405 U. S. 518 (1972), required the reversal of a previous action of the Ohio Supreme Court that dismissed an appeal from a conviction under § 2327.03. *Cason* v. *City of Columbus*, 409 U. S. 1053. Section 2327.03 punishes only spoken words and, as construed by the Ohio courts, is facially unconstitutional because not lim-

ited in application "to punish only unprotected speech" but is "susceptible of application to protected expression." *Gooding* v. *Wilson, supra,* at 522. In that circumstance, the Ohio Supreme Court erred when it found no constitutional infirmity in the holding of the Court of Appeals of Franklin County that the ordinance might constitutionally reach appellant's conduct because "the words as used by the [appellant] are in the nature of 'fighting words' and thereby fall within that limit of conduct proscribed by the ordinance . . . ." For " '[a]lthough [the ordinance] may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the [ordinance]. The [ordinance], in effect, is stricken down on its face. . . .' " *Id.,* at 521.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons expressed in MR. JUSTICE BLACKMUN's dissenting opinion in *Gooding* v. *Wilson,* 405 U. S. 518, 534 (1972), and in the dissenting statement in *Cason* v. *City of Columbus,* 409 U. S. 1053 (1972).

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

Appellant is a Columbus cab driver. He had a female fare in his cab who had requested to be taken to a certain address. When he passed this address, the fare complained and—according to the statement of the trial court—the cab driver's response was "a series of abso-

lutely vulgar, suggestive and abhorrent, sexually-oriented statements."

I would sustain appellant's conviction for the reasons stated in my dissenting opinion in *Rosenfeld* v. *New Jersey*, 408 U. S. 901, 906 (1972). As stated therein:

> "[A] verbal assault on an unwilling audience [or an individual] may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance."

The Columbus City Code was certainly sufficiently explicit to inform appellant that his verbal assault on a female passenger in his cab was "menacing and insulting." As a wrong of this character does not fall within the protection of the First Amendment, the overbreadth doctrine is not applicable. See Model Penal Code, §§ 250.2 (1)(a) and (b) (Proposed Official Draft 1962); see also *Williams* v. *District of Columbia*, 136 U. S. App. D. C. 56, 64, 419 F. 2d 638, 646 (1969).

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE *v.* HIBI

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1652. Decided October 23, 1973

Neither the failure to fully publicize the rights to naturalization afforded by the Nationality Act of 1940 to noncitizens who served in the United States Armed Forces during World War II nor the failure to have an authorized naturalization representative stationed in the Philippine Islands during the time such rights were available, estopped the Government from relying on the fact that the deadline for filing naturalization applications such as respondent Filipino's had expired more than 20 years earlier.

Certiorari granted; 475 F. 2d 7, reversed.

PER CURIAM.

Respondent filed his petition for naturalization in the United States District Court for the Northern District of California on September 13, 1967. The District Court granted the petition, rejecting the negative recommendation of the naturalization examiner appointed by the Attorney General pursuant to § 335 of the Immigration and Nationality Act, 66 Stat. 255, 8 U. S. C. § 1446. The Court of Appeals affirmed, 475 F. 2d 7 (CA9 1973), holding that even though the deadline fixed by Congress for the filing of applications such as respondent's had expired more than 20 years earlier, petitioner was "estopped" from relying on this fact.

Respondent was born in Manila in 1917, and in February 1941 enlisted in the Philippine Scouts, a unit that was part of the United States Army. He was captured by the Japanese Armed Forces and released after six months' internment. In April 1945 after the liberation of the Philippines by Allied Forces, he rejoined the Scouts

and served until his discharge in December 1945.

Sections 701 and 702 of the Nationality Act of 1940, as amended, provided for the naturalization of noncitizens who served honorably in the Armed Forces of the United States during World War II.* Section 701

*Sections 701, 702, and 705 of the Nationality Act of 1940, added by the Second War Powers Act, 1942, 56 Stat. 182, as amended, 8 U. S. C. §§ 1001, 1002, 1005 (1940 ed., Supp. V), provided in pertinent part:

Sec. 701. "[A]ny person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and [w]ho shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; . . . *Provided, however,* That . . . (3) the petition shall be filed not later than December 31, 1946. . . ."

Sec. 702. "During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military . . . forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter

exempted certain alien servicemen who served outside the continental limits of the United States from some of the usual requirements for naturalization, including those of a period of residence in the United States and literacy in English. An amendment to this section specified that all petitions filed under it had to be filed no later than December 31, 1946. Section 702 provided for the overseas naturalization of persons eligible for naturalization under § 701 who were not within the jurisdiction of any court authorized to naturalize aliens; naturalization under § 702 could take place only during active service in the Armed Forces. Section 705 authorized the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, to make such rules and regulations as were necessary to carry into effect the provisions of the Act.

Respondent entered the United States for the first and only time on April 25, 1964, more than 17 years after the expiration of the time limit established by Congress for claiming naturalization under the "exemptions of the Act." He entered on a visitor-for-business visa, which expired on June 30, 1964. His subsequent petition for naturalization was based on the assertion that the Government was estopped from relying on the statutory time limit which Congress had attached to the provisions under which he claimed. The estoppel was said to arise from petitioner's failure to advise him, during the time he was

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touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship . . . ."

Sec. 705. "The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act."

eligible, of his right to apply for naturalization, and from petitioner's failure to provide a naturalization representative in the Philippines during all of the time respondent and those in his class were eligible for naturalization. The District Court adopted respondent's contention, and its conclusions were upheld by the Court of Appeals.

It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.

> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409 (1917).

Here the petitioner has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in respondent's class and established a cutoff date for the claiming of such benefits. Petitioner, in enforcing the cutoff date established by Congress, as well as in recognizing claims for the benefits conferred by the Act, is enforcing the public policy established by Congress.

While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy,* 366 U. S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress ac-

corded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.

Respondent's effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail. The petition for certiorari is granted and the judgment of the Court of Appeals is reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The Court today summarily reverses the decision of the Court of Appeals, which found that the Government was estopped from denying citizenship to respondent under the Nationality Act of 1940.[1] The Court reasons that estoppel is not even arguably applicable because there was no "affirmative misconduct" on the part of the United States; it implies that there were merely failures to "fully publicize" the rights given by the Act and "to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative." Failures of this kind could, perhaps, be excused if caused by the exigencies of war as long as good-faith efforts to carry out the provisions of the Act had been made.

But the Court ignores the record and the decisions below when it speaks only of these failures. In 1942, Congress amended the Nationality Act of 1940 to extend the benefits of citizenship to individuals who had fought in the Armed Forces of the United States during World War II, authorizing the appointment of naturalization

[1] C. 876, 54 Stat. 1137.

officers to confer these benefits on noncitizens outside the jurisdiction of a naturalization court.[2] Between 1943 and 1946, these officers traveled from post to post, through England, Iceland, North Africa, and the islands of the Pacific, naturalizing thousands of foreign nationals pursuant to the mandate of Congress.

The story in the Philippines was different. After the Japanese occupation of the Philippines ended, an American vice-consul was authorized to commence naturalization proceedings in 1945. Almost immediately thereafter, the Philippine Government expressed its concern about

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[2] As amended, Act of Mar. 27, 1942, c. 199, § 1001, which added §§ 701–705 to the 1940 Act, 56 Stat. 182, the Nationality Act waived certain normal requirements for naturalization, such as residency in the United States and literacy in English for noncitizens who had served in the United States Armed Forces. *Id.*, § 701. Section 702 of the amended Act provided that aliens could claim these benefits even when, like respondent, they were outside the jurisdiction of a naturalization court, but only so long as they were in active service in the Armed Forces; this section also explicitly authorized the designation of naturalization officers to effectuate its purposes:

"During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military or naval forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship . . . ." *Id.*, § 702.

Filipino men leaving the Territory after being granted American citizenship. In response to these concerns, the Commissioner of Immigration, on September 13, 1945, wrote a letter to the Attorney General recommending that the "situation . . . be handled by revoking the authority previously granted [the vice-consul] and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. . . ." The Commisioner's recommendation was approved by the Attorney General on September 26, 1945, and the authority of the vice-consul to naturalize alien servicemen immediately revoked.

Because of this action, there was no authorized naturalization representative in the Philippines. The District Court found as a fact that respondent, had he known about his right to be naturalized while he was in the Armed Forces and had means been available, would have applied for naturalization. Instead, with no means available, respondent was discharged from the Armed Forces in December 1945, thereby losing his right to claim citizenship under § 702 of the 1940 Act.[3]

The Court's opinion ignores the deliberate—and successful—effort on the part of agents of the Executive Branch to frustrate the congressional purpose and to deny substantive rights to Filipinos such as respondent by administrative fiat, indicating instead that there was no affirmative misconduct involved in this case.

The record does not support that conclusion. I would grant certiorari and put the case down for oral argument.

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[3] See n. 2, *supra*. It was not until August 1946, eight months after respondent's discharge, that a naturalization agent was reappointed for the Philippines and a good-faith effort made to naturalize Filipinos under § 702 of the Act. In four months, 4,000 Filipinos took advantage of the opportunity.

DENNETT *v.* HOGAN, WARDEN

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS

No. 72-6449. Decided October 23, 1973

Since the Court of Appeals was apparently unaware of the indigent petitioner's initial request for appointment of counsel to represent him on appeal from a conviction, and mistakenly believed that he had never filed a financial affidavit with the trial court, petitioner's habeas corpus application, brought to this Court after the Court of Appeals had dismissed his appeal, is treated as a petition for certiorari, which is granted, and the case is remanded to the Court of Appeals to determine whether the appeal had been improvidently dismissed.

Certiorari granted; vacated and remanded.

PER CURIAM.

The petitioner is a disbarred attorney convicted of security fraud. At his trial the court appointed advisory counsel for him, finding that he qualified as an indigent. He was convicted. He later filed with a judge of the Court of Appeals a *pro se* request for extension of time in which to submit his brief on appeal. This was granted. But an accompanying inquiry concerning appointment of counsel to handle the appeal was ignored. His right to have appointed counsel here is clear. 18 U. S. C. § 3006A (c);* cf. *Douglas* v. *California*, 372 U. S. 353 (1963). Subsequently the petitioner requested another extension of time and renewed his request for appointed counsel. The Government opposed both motions; they were denied and the appeal was dismissed.

*Section 3006A (c) reads in part as follows: "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal."

The petitioner, still acting *pro se*, then brought this application for habeas corpus to this Court.

In his response to the application the Solicitor General informed the Court that it appeared that the judge below was unaware of the petitioner's initial request for counsel, and mistakenly believed that the petitioner had never filed a financial affidavit with the trial court. The Solicitor General therefore suggested that this Court should treat the application as a petition for certiorari, and grant certiorari and remand the case to the Court of Appeals for determination of whether the petitioner's appeal had been improvidently dismissed.

On examination of the record, we follow the suggestion of the Solicitor General, grant certiorari, vacate the judgment of the Court of Appeals, and remand the case to that court.

So ordered.

MR. JUSTICE REHNQUIST dissents.

NORWELL *v.* CITY OF CINCINNATI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 72–1366. Decided November 5, 1973

Cincinnati's disorderly conduct ordinance operated to deprive petitioner of his constitutionally protected freedom of speech, where it appeared that he was arrested and convicted merely because he verbally and negatively protested the arresting officer's treatment of him, and there was no use of abusive language or fighting words.

Certiorari granted; reversed.

PER CURIAM.

Petitioner Edward Norwell, on a plea of not guilty, was convicted of a violation of Cincinnati's disorderly conduct ordinance. The charge was that petitioner "did unlawfully and wilfully conduct himself in a disorderly manner, with intent to annoy some person." The judgment of conviction was affirmed by the Ohio Court of Appeals. Further appeal to the Supreme Court of Ohio was dismissed by that court *sua sponte* "for the reason that no substantial constitutional question exists herein."

We are persuaded that the ordinance, as applied to this petitioner on the facts of his case, operated to punish his constitutionally protected speech. We therefore grant certiorari and reverse.

The ordinance, § 901–D4 of the city's Municipal Code, reads:

> "No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person . . . ."

Petitioner, 69 years of age and an immigrant 20 years ago, is employed by his son who manages and is part

owner of a "pony keg," a small package liquor store. Petitioner works at the pony keg every evening and helps his son "because it is very dangerous." There have been break-ins at the store on several occasions and a former owner was killed there.

On Christmas night, 1971, the pony keg closed about 10:30. The son drove home, but petitioner "wanted to take a walk and get home at 11:00 to hear the news." Down the street, he was approached by Officer Johnson, who had been notified that a "suspicious man" was in the neighborhood of the pony keg. Officer Johnson testified that he approached petitioner and asked him if he lived in the area. Petitioner looked at him, "and then he turned around and walked away." The officer twice attempted to stop him, but each time petitioner threw off his arm and protested, "I don't tell you people anything." He did not run. Petitioner then was placed under arrest for disorderly conduct. Officer Johnson said he had to "push the man approximately half a block to get him into the police car. He didn't understand why he was being arrested."

Petitioner testified that he "was far from the pony keg" when the officer drove up in his car and called out something which petitioner did not understand.

> "He told me something, but I couldn't understand . . . . I said—I asked him, 'What do you want from me?' He said, 'Why are you on the street?' I said, 'I am walking on the street.' After then, he said, 'Where are you going?' I said, 'I go home.' After then, he didn't ask me anything. He was in a car. I continued to walk."

The officer pursued petitioner and grabbed him. Petitioner testified, "I didn't resist because I was concerned about my health and my life."

There is no indication in the record that it was the physical act of pushing off the officer's arm that precipitated the arrest or supported the conviction. Had this been so, one could argue, perhaps, that Mr. Norwell might have been properly charged for disorderly conduct or under a statute or ordinance that made it illegal to interfere with a police officer in the performance of his duty. That, however, is not this case. Officer Johnson testified that he "didn't charge the man with resisting because I didn't think it was a warranted cause," but that he arrested petitioner for "being loud and boisterous," and "[h]e was annoying me." The municipal judge found that petitioner was "hostile" to the officer. "I'm sure [the officer] had no feeling against this man, but this man had a feeling against him, at this time, and was not at a liberty to say." The court proceeded to find Mr. Norwell "guilty of disorderly conduct with the intent to annoy" and fined him $10 and costs "for being so noisy."

Upon this record, we are convinced that petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer. Regardless of what the motivation may have been behind the expression in this case, it is clear that there was no abusive language or fighting words. If there had been, we would have a different case. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

The petition for certiorari is granted. The judgment is reversed.

TAYLOR *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72–6915. Decided November 5, 1973

Petitioner effectively waived his right to be present at his criminal trial by voluntarily absenting himself therefrom through failure to return to the courtroom after the morning session of the first day of trial, and the Court of Appeals properly applied Fed. Rule Crim. Proc. 43 and affirmed the conviction, it being unnecessary to show that petitioner knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally the witnesses against him. *Diaz* v. *United States*, 223 U. S. 442.

Certiorari granted; 478 F. 2d 689, affirmed.

PER CURIAM.

On the first day of his trial on four counts of selling cocaine in violation of 26 U. S. C. § 4705 (a) (1964 ed.), petitioner failed to return for the afternoon session. He had been present at the expiration of the morning session when the court announced that the lunch recess would last until 2 p. m., and he had been told by his attorney to return to the courtroom at that time. The judge recessed the trial until the following morning, but petitioner still did not appear. His wife testified that she had left the courtroom the previous day with petitioner after the morning session; that they had separated after sharing a taxicab to Roxbury; that he had not appeared ill; and, finally, that she had not heard from him since. The trial judge then denied a motion for mistrial by defense counsel, who asserted that the jurors' minds would be tainted by petitioner's absence and that continuation of the trial in his absence deprived him of his Sixth Amendment right to confront witnesses against him. Relying

upon Fed. Rule Crim. Proc. 43,[1] which expressly provides that a defendant's voluntary absence "shall not prevent continuing the trial," the court found that petitioner had absented himself voluntarily from the proceedings.

Throughout the remainder of the trial, the court admonished the jury that no inference of guilt could be drawn from petitioner's absence. Petitioner was found guilty on all four counts. Following his subsequent arrest, he was sentenced to the statutory five-year minimum. The Court of Appeals affirmed the conviction, 478 F. 2d 681 (CA1 1973), and we now grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari and affirm the judgment of the Court of Appeals.

There is no challenge to the trial court's conclusion that petitioner's absence from the trial was voluntary,[2] and no claim that the continuation of the trial was not authorized by Rule 43. Nor are we persuaded that Rule 43 is unconstitutional or that petitioner was deprived of any constitutional rights in the circumstances before us. Rule 43 has remained unchanged since the adoption of the Federal Rules of Criminal Procedure in 1945; and with respect to the consequences of the defendant's voluntary absence from trial, it reflects the long-

[1] Rule 43 provides, in pertinent part:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

[2] Following an independent review of the transcripts from the trial and sentencing hearing, the Court of Appeals also concluded that petitioner knew that he was entitled to be present in court during every stage of his trial and that his absence was a product of his voluntary choice. 478 F. 2d 689, 691 n. 4 (1973).

standing rule recognized by this Court in *Diaz* v. *United States,* 223 U. S. 442, 455 (1912):

> "[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (Citations omitted.)

Under this rule, the District Court and the Court of Appeals correctly rejected petitioner's claims.

Petitioner, however, insists that his mere voluntary absence from his trial cannot be construed as an effective waiver, that is, "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), unless it is demonstrated that he knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally the witnesses against him.[3]

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[3] This was substantially the holding of *United States* v. *McPherson,* 137 U. S. App. D. C. 192, 195, 421 F. 2d 1127, 1130 (1969), on which petitioner relies. But the Court of Appeals in the case now before us disagreed with *McPherson,* and, in our view, rightly so. *McPherson* itself appears to have strayed from recent precedent in the District of Columbia Circuit, *Cureton* v. *United States,* 130 U. S. App. D. C. 22, 396 F. 2d 671 (1968), as well as from older authority. See *Falk* v. *United States,* 15 App. D. C. 446, 454–461 (1899). In *Cureton, supra,* Judge Fahy stated the controlling rule:

"[I]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no

Like the Court of Appeals, we cannot accept this position. Petitioner had no right to interrupt the trial by his voluntary absence, as he implicitly concedes by urging only that he should have been warned that no such right existed and that the trial would proceed in his absence. The right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence. Consistent with Rule 43 and *Diaz*, we conclude that it was.

It is wholly incredible to suggest that petitioner, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at the trial, see *Stack* v. *Boyle*, 342 U. S. 1, 4–5 (1951), entertained any doubts about his right to be present at every stage of his trial. It seems equally incredible to us, as it did to the Court of Appeals, "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence." 478 F. 2d, at 691. Here the Court of Appeals noted that when petitioner was questioned at sentencing regarding his flight, he never contended that he was unaware that a consequence of his flight would be a continuation of the trial without him. Moreover, no issue of the voluntariness of his disappearance was ever raised. As was recently noted, "there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." *Illinois* v. *Allen*, 397 U. S. 337, 349 (1970) (BRENNAN, J., concurring). Under the circumstances present here, the Court of Appeals properly applied Rule 43 and affirmed the judgment of conviction.

Affirmed.

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sound reason for remaining away." 130 U. S. App. D. C., at 27, 396 F. 2d, at 676 (citation omitted).

WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. *v.* STONE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–122. Decided November 5, 1973

Florida statutory provision proscribing "the abominable and detestable crime against nature, either with mankind or beast . . . ," in light of the State Supreme Court's longstanding construction as applying to copulation per os and per anum, *held* not unconstitutionally vague; and that court's later ruling after appellees' convictions for those offenses had become final holding the statute void for vagueness as applied to oral and anal sexual activity did not require reversal of appellees' convictions since the subsequent ruling was prospective only and at the time appellees committed the acts they were on clear notice that their conduct was criminal under the statute as then construed.

478 F. 2d 390, reversed.

PER CURIAM.

In separate trials, appellees were convicted of violating Fla. Stat. § 800.01 (1965), which proscribed "the abominable and detestable crime against nature, either with mankind or with beast . . . ." [1] Having exhausted state remedies,[2] appellees sought federal habeas corpus,

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[1] Fla. Stat. § 800.01 (Supp. 1973) presently provides: "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be guilty of a felony of the second degree, punishable as provided in [other statutory sections]." At the time of appellees' convictions the maximum penalty was 20 years' imprisonment.

[2] Appellee Stone's conviction was affirmed on direct appeal, *Stone* v. *State*, 245 So. 2d 91 (Fla. Dist. Ct. App. 1971), and his motion for post-conviction relief was denied. *Stone* v. *State*, 264 So. 2d 81 (Fla. Dist. Ct. App.), cert. denied, 267 So. 2d 329 (Fla. Sup. Ct. 1972). It appears that appellee Huffman appealed from his conviction, but did not seek collateral relief. The District Court found exhaustion

asserting, among other things, that the Florida statute was impermissibly vague. The writ was granted to both appellees. The Court of Appeals affirmed on the sole ground that § 800.01 was unconstitutionally vague and void on its face for failure to give appellees adequate notice that the conduct for which they were convicted was forbidden by law. 478 F. 2d 390 (CA5 1973).

We reverse. We perceive no violation of the "underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). Stone was convicted for copulation per os and per anum, Huffman for copulation per anum. These very acts had long been held to constitute "the abominable and detestable crime against nature" under § 800.01 and predecessor statutes. *Delaney* v. *State*, 190 So. 2d 578 (Fla. Sup. Ct. 1966), appeal dismissed, 387 U. S. 426 (1967), declared as much; and this had been the case since 1921 under *Ephraim* v. *State*, 82 Fla. 93, 89 So. 344 (1921). *Delaney* also held that there could be no complaint of vagueness or lack of notice that the defendant's conduct was criminal where the acts committed were among those that prior cases had held covered by the statute.

Delaney and its supporting cases require reversal of the Court of Appeals. The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation "we must take the statute as though it read precisely as the highest court of the State has

unnecessary since Huffman's claim had already been determined adversely by the ruling in *Franklin* v. *State*, 257 So. 2d 21 (Fla. Sup. Ct. 1971), discussed in text *infra*.

interpreted it." *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U. S. 270, 273 (1940). When a state statute has been construed to forbid identifiable conduct so that "interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature," claims of impermissible vagueness must be judged in that light. *Winters* v. *New York,* 333 U. S. 507, 514 (1948). This has been the normal view in this Court. *Fox* v. *Washington,* 236 U. S. 273, 277 (1915); *Beauharnais* v. *Illinois,* 343 U. S. 250, 253 (1952); *Mishkin* v. *New York,* 383 U. S. 502, 506 (1966). The Court of Appeals, therefore, was not free to ignore *Delaney* and related cases; and as construed by those cases, § 800.01 afforded appellees ample notice that their conduct was forbidden by law.

Appellees rely on *Franklin* v. *State,* 257 So. 2d 21 (Fla. Sup. Ct. 1971), to avoid the efficacy of prior constructions of § 800.01. In that case, decided after appellees' convictions had become final, the Florida Supreme Court reconsidered *Delaney* and held that if § 800.01 was intended to reach oral and anal sexual activity, that intention should appear on the face of the statute; otherwise it was void for vagueness and uncertainty in its language. But this holding did not remove the fact that when appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statute as then construed. Thus, the Florida Supreme Court expressly ruled in *Franklin* that "this judgment holding the felony statute void is not retroactive, but prospective only," *id.,* at 24; and subsequently the Florida courts denied appellee Stone's request for relief based on the *Franklin* case. *Stone* v. *State, supra,* n. 2. The State Supreme Court did not overrule *Delaney* with respect to pre-*Franklin* convictions. Nor was it constitutionally compelled to do so or

to make retroactive its new construction of the Florida statute: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). Contrary to the judgment of the Court of Appeals, § 800.01 was not void at the time appellees performed the acts for which they were convicted. The motion of appellees to proceed *in forma pauperis* is granted and the judgment of the Court of Appeals is reversed.

So ordered.

MOORE *v.* ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 73–5002. Decided November 5, 1973

Where petitioner was tried for murder in Arizona almost three years after he was charged and 28 months after he first demanded that Arizona either extradite him from California, where he was serving a prison term, or drop a detainer against him, the Arizona Supreme Court, in affirming the denial of petitioner's pretrial habeas corpus application, erred in ruling that a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim. In addition to possible prejudice, a court must weigh the reasons for delay in bringing an incarcerated defendant to trial, and should also consider the possible impact pending charges might have on defendant's prospects for parole and meaningful rehabilitation. *Smith* v. *Hooey,* 393 U. S. 374; *Dickey* v. *Florida,* 398 U. S. 30; *Barker* v. *Wingo,* 407 U. S. 514.

Certiorari granted; 109 Ariz. 111, 506 P. 2d 242, vacated and remanded.

PER CURIAM.

Almost three years after he was charged and 28 months after he first demanded that Arizona either extradite him from California, where he was serving a prison term, or drop a detainer against him, petitioner was tried for murder in Arizona. Prior to trial, he filed a state habeas corpus application, alleging a deprivation of his Sixth and Fourteenth Amendment right to a speedy trial. In affirming the denial of the petition, the Arizona Supreme Court ruled that under this Court's decisions in *Dickey* v. *Florida,* 398 U. S. 30 (1970), and *Barker* v. *Wingo,* 407 U. S. 514 (1972), a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim. The state court found no such prejudice here because petitioner was afforded a

preliminary hearing and allowed to subpoena witnesses.[1] 109 Ariz. 111, 506 P. 2d 242 (1973).

The state court was in fundamental error in its reading of *Barker* v. *Wingo* and in the standard applied in judging petitioner's speedy trial claim. *Barker* v. *Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial:

> "We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." 407 U. S., at 533 (footnote omitted).

In addition to possible prejudice, any court must thus carefully weigh the reasons for the delay in bringing an incarcerated defendant to trial. In the face of petitioner's repeated demands, did the State discharge its "constitutional duty to make a diligent, good-faith effort to bring him [to trial]"? *Smith* v. *Hooey*, 393 U. S. 374, 383 (1969).

Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible

[1] The court did not mention the unavailability of one of the two key witnesses as the result of her deportation 18 months after the charge had been filed against petitioner.

prejudice to his defense in those proceedings.[2] Inordinate delay,

> "wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' *United States* v. *Marion,* 404 U. S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty." *Barker* v. *Wingo, supra,* at 537 (WHITE, J., concurring).

See also *id.,* at 532–533 (majority opinion). Some of these factors may carry quite different weight where a defendant is incarcerated after conviction in another State, but no court should overlook the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation. *Strunk* v. *United States,* 412 U. S. 434, 439 (1973).

The State of Arizona itself has conceded that this is a close case under *Barker* v. *Wingo* and that it is arguable whether the three-year delay was excusable. Because we agree and because "the right to a speedy trial is as

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[2] The examples of possible trial prejudice recited in *Barker* bear directly on this case:

"If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker* v. *Wingo,* 407 U. S. 514, 532 (1972).

fundamental as any of the rights secured by the Sixth Amendment," *Klopfer* v. *North Carolina*, 386 U. S. 213, 223 (1967), we grant the motion for leave to proceed *in forma pauperis* and the petition, vacate the judgment, and remand to the Arizona Supreme Court to reassess petitioner's case under the standards mandated by *Smith*, *Barker*, and *Dickey*.

So ordered.

BERRY *v.* CITY OF CINCINNATI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73-5245. Decided November 5, 1973

Persons convicted prior to the decision in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), are entitled to the constitutional rule enunciated in that case that, absent a knowing and intelligent waiver, an indigent accused may not be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, if he was denied the assistance of counsel, if they allege and prove a bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court.

Certiorari granted; 34 Ohio St. 2d 106, 296 N. E. 2d 532, reversed.

PER CURIAM.

Petitioner, who was serving a sentence for a misdemeanor offense when *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), was decided, sought relief in the state courts claiming that because *Argersinger* should be accorded retroactive effect and because his trial and sentencing were uncounseled, his conviction should be invalidated. The Supreme Court of Ohio refused to apply *Argersinger* to convictions occurring prior to that decision. *City of Cincinnati* v. *Berry*, 34 Ohio St. 2d 106, 296 N. E. 2d 532 (1973). Petitioner was enlarged on bail pending action on his claim and faces reincarceration should the judgment of the Ohio courts remain undisturbed. The motion to proceed *in forma pauperis* and the petition for certiorari are granted, and the judgment of the Ohio Supreme Court is reversed. Those convicted prior to the decision in *Argersinger* are entitled to the constitutional rule enunciated in that case, *Kitchens* v. *Smith*, 401 U. S. 847 (1971); *Williams* v. *United States*, 401 U. S. 646, 653 and n. 6 (1971) (opinion of WHITE, J.); *Burgett*

v. *Texas*, 389 U. S. 109, 114 (1967); cf. *Adams* v. *Illinois*, 405 U. S. 278 (1972), if they allege and prove a bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court. *Sibron* v. *New York*, 392 U. S. 40, 50–58 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968); *Ginsberg* v. *New York*, 390 U. S. 629, 633–634, n. 2 (1968).

So ordered.

MUSSER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1733. Decided November 12, 1973.*

A local draft board's mere refusal to reopen a registrant's classification following a claim for conscientious objector status made after issuance of an order to report for induction and based on an assertion that the registrant's conscientious objection to war in any form had crystallized after the issuance of the order to report, cannot signify more than a recognition of lack of power to reopen, and cannot be read as a "denial" of the claim on the merits and thus a bar to in-service review, no matter what the board's apparent motivations in refusing to reopen may have been, and notwithstanding an expressed or unexpressed indication of the board's view of the claim. *Ehlert* v. *United States*, 402 U. S. 99.

Certiorari granted; No. 72–1733, 478 F. 2d 1068; and No. 72–6748, 474 F. 2d 90, affirmed.

PER CURIAM.

The petitioners in these cases were each convicted for refusing to submit to induction into the Armed Forces, 50 U. S. C. App. § 462 (a), and each seeks review of the judgment affirming his conviction upon the sole ground that the order to report for induction was invalid for failure of the local board to reopen his classification pursuant to a request for a conscientious objector classification, see *Mulloy* v. *United States*, 398 U. S. 410, 418 (1970).

In No. 72–1733, the petitioner Musser received an order to report for induction, issued by his local board on September 15, 1970. On September 21, 1970, he re-

*Together with No. 72–6748, *Waldron* v. *United States*, on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

quested and received Selective Service System Form 150, a special form for those seeking conscientious objector classification. Musser filled out the form, indicating in response to the questions posed that he was conscientiously opposed to participation in war in any form by reason of his religious training and belief, and claiming exemption from combatant and noncombatant training and service pursuant to 50 U. S. C. App. § 456 (j). On September 29, 1970, the local board reviewed Musser's application. The minutes of that meeting indicate that in the opinion of the members of the board, his claim "lack[ed] sincerity" and that he "[had to] report for induction." On the same day he was sent a form letter stating that his application had been received and reviewed, that he was "hereby advised [that the board] did not specifically find there has been a change in status resulting from circumstances over which you had no control," and that pursuant to Selective Service Regulation 1625.2, 32 CFR § 1625.2,[1] his classification would therefore not be reopened.[2]

[1] At the time the administrative decisions involved in these cases were made, Regulation 1625.2 read in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

[2] As used in the Selective Service Regulations and in this opinion, the term "reopen" signifies a fresh determination by the local board of the classification to which a registrant belongs. See Regulation 1625.11, 32 CFR § 1625.11. When a case is reopened by a local board, the registrant is automatically accorded the right to a per-

Musser was subsequently advised by the board of his continuing duty to report and was in fact ordered to report for induction on January 19, 1971. On that date he appeared at the induction center but refused to submit to induction. For this refusal he was convicted in a jury-waived trial and sentenced to two years' imprisonment. The Court of Appeals affirmed, 478 F. 2d 1068 (CA9 1973).

In No. 72–6748, the petitioner Waldron was, on December 30, 1968, mailed an order to report for induction on February 5, 1969. Shortly thereafter, he requested, received, and completed an SSS Form 150, indicating his opposition to war in any form and requesting a conscientious objector classification. On January 24, 1969, the board notified him that it had reviewed his application but "found no grounds for reopening your classification." Subsequently, on January 28, 1969, the State Director of Selective Service reviewed Waldron's file and recommended to the local board that his induction be postponed pursuant to Regulation 1632.2, 32 CFR § 1632.2, and that he be given a "courtesy interview" pursuant to then-current Local Board Memorandum 41. Waldron was thereupon sent a letter indicating that his induction was being postponed until February 19, 1969, and that he would be granted an interview on February 5, 1969. On February 6, following the interview, he was notified that the board found "no grounds for reopening your classification after you[r] being interviewed" and that he had to report for induction on February 19. He arranged further to postpone the date of his induction

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sonal appearance before the local board and an administrative appeal of any adverse decision by the board, Regulation 1625.13, 32 CFR § 1625.13, even though a registrant is "reclassified" in the same classification as that in which he had formerly been put. *Mulloy* v. *United States*, 398 U. S. 410, 414–415 (1970).

until March 27, 1969, in order to be able to report for induction in another city where he was then living, and on that date he refused to submit to induction. He was thereafter tried and convicted of refusing to submit to a valid order to report for induction, and the Court of Appeals affirmed, 474 F. 2d 90 (CA7 1973).

In *Ehlert* v. *United States*, 402 U. S. 99 (1971), this Court reviewed a claim that a local Selective Service board, operating under laws and regulations substantially the same as those involved here, must reopen a registrant's classification following a claim for conscientious objector status made after issuance of an order to report for induction and based on an assertion that the registrant's conscientious objection to war in any form had "crystallized" after the issuance of the order to report. The Court reasoned that "[a] regulation explicitly providing that no conscientious objector claim could be considered by a local board unless filed before the mailing of an induction notice would . . . be perfectly valid" as a reasonable timeliness rule to insure that all possible claims be presented to and reviewed by the local board prior to its determination that a given registrant is subject to induction. *Id.*, at 101–102. The Court also concluded, however, that "those whose views are late in crystallizing" cannot "be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria" that govern claims based on views crystallizing prior to issuance of induction notices. *Id.*, at 103. Such a full and fair opportunity, the Court found, existed in in-service Armed Services procedures for hearing and evaluating conscientious objector claims. Under such a system, the "intolerable" situation of a "no man's land" in which post-notice claims for CO classification were not heard by the local boards because of their timeliness rules, and were not heard by the Army after in-

duction because of a finding that an inductee had waived his right to claim such classification, was avoided: claims crystallizing prior to issuance of an order to report must be directed to and are to be reviewed by local boards, while claims crystallizing thereafter are to be reviewed only by the Armed Forces after induction. *Id.*, at 104 n. 7.

Selective Service regulations, however, did not unambiguously create such a system, but left open the possibility that a classification be reopened after issuance of a notice to report if the local board "specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 CFR § 1625.2. Prior to *Ehlert,* the courts of appeals had divided on the question of whether late crystallization of conscientious objector views qualified as such a change. 402 U. S., at 101 n. 3. In *Ehlert,* we avoided the "theological" argument of whether, as a matter of law, a claim of late-crystallizing conscientious objection was a change over which "the registrant has no control." Rather, we held that in view of consistent administrative interpretation by the Government that changes envisaged by Regulation 1625.2 were limited to "objectively identifiable" and "extraneous" circumstances,[3] such an interpretation of the regulation would be adopted. *Id.*, at 105.

Finally, we considered in *Ehlert* whether "the conditions for the validity of such a rule . . . are met in practice." After reviewing Army regulations, Department of Defense Directives, and a letter from the General Counsel of the Department of the Army, we de-

[3] As examples of the sort of nonvolitional changes that Regulation 1625.2 was intended to allow, the Government has consistently cited, and the Court in *Ehlert* mentioned, an injury to the registrant or death in his family making him the sole surviving son. 402 U. S., at 104.

termined that an inductee claiming late-crystallizing conscientious objector status would receive a full and fair opportunity to have his claim heard by Armed Forces personnel. *Id.*, at 106–107.

The petitioners in these cases make overlapping arguments in attempting to avoid the *Ehlert* precedent. First, relying on decisions and opinions of the First and Third Circuits,[4] they contend that the refusals of the local boards to reopen their classifications could be read as a "denial" of those claims and thus a bar to in-service review. In particular, they point to ¶ 3.b (2) of Army Regulation 635–20, not cited or discussed in the *Ehlert* opinion, which states that in-service claims for conscientious objector treatment will not be favorably considered when "[b]ased solely on conscientious objection claimed *and denied* by the Selective Service System prior to induction." (Emphasis added.) In the language of the First Circuit, "if the Army could have read the draft board's reasonless refusal to reopen as a 'denial' then [a registrant] might well have been placed in a mutual buck-passing situation where neither the draft board nor the Army would consider his claim on the merits." *United States* v. *Alioto*, 469 F. 2d 722, 727 (1972). *Ehlert*, the petitioners claim, did not deal with this problem because the board in that case had explicitly stated that it was not denying Ehlert's claim on the merits, but was refusing to reach those merits since no showing had been made of a " 'change in the registrant's status resulting from circumstances over which the registrant had no control.' " 402 U. S., at 100. Thus, they argue, the

[4] *United States* v. *Alioto*, 469 F. 2d 722 (CA1 1972); *United States* v. *Ziskowski*, 465 F. 2d 480 (CA3 1972); *United States* v. *Shomock*, 462 F. 2d 338 (CA3 1972). See also *United States* v. *Cotton*, 346 F. Supp. 691 (SDNY 1972); *United States* v. *Usdin*, 6 S. S. L. R. 3039 (EDNY 1972).

ambiguity of the board's refusal to reopen, taken together with current Army regulations, raises the specter of the kind of no man's land specifically found intolerable in *Ehlert.*

The petitioners misconstrue the reasoning and effect of our holding in *Ehlert.* In adopting the Government's interpretation of Regulation 1625.2 that a late crystallization was not a circumstance over which a registrant "had no control," the Court did not hold merely that a local board would be permitted to refuse reopening of a classification in such a situation,[5] but that it was without power to reopen under such circumstances. The mandatory language of Regulation 1625.2, that classification "shall not be reopened" unless the proviso is met, requires no less. If a local board is not empowered to reopen the classification, it follows that it is similarly without power to make any ruling on the merits of a registrant's claims, since such a ruling on the merits of a claim can be made only by a reopening, with concomitant rights in the registrant to a personal appearance and an administrative appeal of an adverse decision, see n. 2, *supra.* From this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.

The petitioners further argue that while each board's action in these cases took the form of a refusal to reopen, the decision not to do so was in fact based on the board's consideration of the merits, and could be viewed

[5] Although the language of Regulation 1625.2 is permissive in stating that a local board "may" reopen if the prerequisites are met, in *Mulloy* v. *United States, supra,* we held that a board must reopen a classification if a prima facie case for a new classification has been made to the board and the timeliness requirements are met. 398 U. S., at 415–416.

as such by the Armed Forces.[6] The simple answer to this contention is that no matter what the boards' apparent motivations in refusing to reopen the petitioners' classifications may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of the boards' views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert*, we turn finally to a consideration of whether "the conditions for the validity of such a rule . . . are met in practice." Army Regulation 635–20, ¶ 3.b (2), *supra*, bars in-service review of a request for conscientious

[6] The petitioners in both of the present cases, relying primarily on *Miller* v. *United States*, 388 F. 2d 973 (CA9 1967), contend that by considering the merits of the claims for conscientious objector status the boards effected a "de facto reopening" which was merely clothed as a denial of reopening. In *Miller* and in the subsequent case of *United States* v. *Aufdenspring*, 439 F. 2d 388 (CA9 1971), the State Director, acting under since-rescinded Regulation 1625.3, independently ordered a reopening of the registrants' cases, thus circumventing the timeliness proviso contained in Regulation 1625.2 with respect to requests for reopening by registrants. The courts in those cases held that the local boards' refusals to reopen were procedurally impermissible, since in each case the refusal was based on a review of the substance of the registrant's claim and thus was in fact a refusal to reclassify without the procedural advantages to the registrant inherent in a reclassification, see n. 2, *supra*.

Those decisions were correctly distinguished by the Courts of Appeals in the present cases. Petitioner Musser's claim for a reopening and reclassification was based solely upon his own request, and thus the timeliness proviso of Regulation 1625.2 fully applied. In Waldron's case, the State Director recommended postponement and an interview in accordance with Local Board Memorandum 41. But the court found that this postponement was effected under the Director's authority given by Regulation 1632.2 to postpone any induction, rather than in the exercise of his authority under Regulation 1625.3 to cause a reopening; further, the court noted that the Director's suggestion of an interview could not in any event trigger a reopening under Regulation 1625.3 since the communication was not in writing, as that Regulation specifically required.

objector status if such a request has been "claimed and denied by the Selective Service System prior to induction." While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that *Ehlert* has made clear that such a refusal can only be based on the board's lack of power to reopen in such a posture. We note that in a letter written by the General Counsel for the Department of the Army with respect to the then-pending case of *United States* v. *Shomock* and printed in the opinion of that case, 462 F. 2d 338, 345 n. 17 (CA3 1972), the General Counsel indicated that when a refusal to reopen is not based on a decision on the merits, a registrant may raise such a claim in the Army and will be given a full and fair hearing.[7] In the event that a local board in one way or another mani-

[7] The pertinent part of the General Counsel's letter is as follows:

"If the appellant had entered the Army in May 1969 under circumstances where the Selective Service System actually considered and denied his conscientious objector claim *on the merits*, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.

"If the appellant had entered the Army in May 1969 under circumstances where his local draft board *merely refused to reopen his classification because his asserted-views crystallized subsequent to the receipt of his induction notice*, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim." 462 F. 2d, at 345. (Emphasis added.)

Although the letter interpreted and reported policies in effect at the time of Shomock's ordered induction, there appears to have been no significant change of policy at the time of the ordered inductions in these cases.

fests its views as to the sincerity of a registrant's late-crystallizing claims, as in the case of the petitioner Musser, or expresses any other conclusion concerning the merits of his claims, such expressions must be given no effect by the Armed Forces in reviewing an in-service conscientious objector request.

It follows that the Courts of Appeals in these cases correctly ruled that the petitioners' orders to report for induction were valid. The motion of the petitioner Waldron for leave to proceed *in forma pauperis* and the petitions for certiorari are granted, and the judgments are

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant these petitions and set these cases for oral argument.

MR. JUSTICE DOUGLAS, dissenting.

In *Ehlert* v. *United States*, 402 U. S. 99 (1971), the Court decided that the Selective Service System may place special hurdles on conscientious objector claims first raised after a notice of induction has been issued. In allowing the Selective Service to set what it termed reasonable "timeliness" regulations, the Court assumed that the conscientious objector claims not considered by the local board would receive full consideration by the military after induction. *Id.*, at 107. "[I]f . . . a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria, . . . a wholly different case would be presented." *Ibid.* I dissented in *Ehlert*, arguing that under the regulations of the Selective Service System the local boards should consider the claim as arising from a circumstance over which

the registrant has no control, and that civilian rather than military adjudication of these claims should be preferred. *Id.*, at 108. But apart from my own views on that question, the decisions affirmed in today's *per curiam* are highly questionable, since they appear to be that "wholly different case."

Neither petitioner in these cases received a full administrative review of the conscientious objector claims presented to his local board. But in each case the board purported to look into the claim. In Musser's case the board made an explicit finding that his beliefs were not "sincere"—a finding which one judge below found to be without basis. In Waldron's case no explicit finding on the merits was made, yet the board postponed his induction and interviewed him after the State Director recommended this course following his review of Waldron's file. Waldron's claim was not specifically denied as untimely. Thus in each case it would appear that either explicitly or implicitly some evaluation of the merits of the CO claim was made. But because the claims were considered late, neither petitioner was afforded the normal administrative appeal rights.[1] Such a result can be justified under *Ehlert* only if these claims are to receive full *de novo* consideration by the military. In challenging assurances that their claims will receive such consideration, the petitioners point to ¶ 3.b (2) of Army Regulation 635–20, which was not considered in *Ehlert*. It provides that "[r]equests for discharge after entering military service will not be favorably considered when . . . (2) [b]ased solely on conscientious

[1] If the board reopens the file, the registrant has the right after an adverse decision to a personal appearance before the board and appeal. Since here the files were not considered reopened, the petitioners had no such rights. Compare 32 CFR § 1625.4 with 32 CFR § 1625.13.

objection claimed and denied by the Selective Service System prior to induction."

The issue, then, is whether the actions of petitioners' local boards may constitute, in the Army's view, denial of the CO claim, thus barring its consideration by the Army. On its face the regulation would surely allow this construction. Such a possibility could perhaps have been avoided if the local boards in these cases had explicitly based their actions on the claims' being untimely, as the Board in *Ehlert* did. But the boards here did not do this, and indeed in Musser's case purported rather clearly to reject the claim on the merits. These cases are thus different from the petitioner's in *Ehlert*. With the local board's actions here at best ambiguous, we cannot know that the Army will consider the claims.

The majority emphasizes that in the circumstances of these cases the local boards were without authority to reopen the classifications and consider the claims on the merits. That is, of course, now the law. But while this rule effectively forecloses registrants from the procedural rights within the Selective Service System that a reopening would afford, it cannot guarantee that the Army will afford the registrant a full hearing on his claims. That will depend upon the Army's application of its own regulations to these facts.[2]

[2] Unlike *Ehlert*, in these cases we have no assurances from the Army that the registrants will receive a hearing. The majority refers to a letter from the Army's General Counsel lodged with the Court of Appeals in *United States* v. *Shomock*, 462 F. 2d 338, 345 n. 17 (CA3 1972). But this letter does no more than distinguish between claims denied by the Selective Service System on the merits and those not considered because the board did not reopen the classification; only the latter will receive a hearing in the Army. But there is no assurance that in the confused circumstances of these cases the Army will not consider these claims to have been denied on the merits.

Indeed, even if we assume that the Army will superficially grant petitioners' claims *de novo* consideration, we in fact have no way of discovering whether *sub silentio* some weight will be accorded the prior proceedings of the draft boards. Yet those proceedings are deserving of no weight whatsoever since petitioners were foreclosed from the administrative appeal ordinarily allowed.

The opinions summarily affirmed today conflict squarely, as the Solicitor General concedes, with decisions in the First, Second, and Third Circuits. *United States* v. *Alioto,* 469 F. 2d 722 (CA1 1972); *United States* v. *Jerrold,* 480 F. 2d 1293 (CA1 1973); *United States* v. *Cotton,* 346 F. Supp. 691 (SDNY 1972); *United States* v. *Usdin,* 6 S. S. L. R. 3039 (EDNY 1972); *United States* v. *Shomock,* 462 F. 2d 338 (CA3 1972); *United States* v. *Ziskowski,* 465 F. 2d 480 (CA3 1972); *United States* v. *Folino,* No. 72–1974, CA3 June 29, 1973. At a minimum we should have set these cases for argument and full briefing.

DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 72–481. Argued October 10, 1973—Decided November 19, 1973*

Commercial net fishing by Puyallup Indians, for which the Indians have treaty protection, *Puyallup Tribe* v. *Dept. of Game*, 391 U. S. 392, forecloses the bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against the Puyallups, and as long as steelhead fishing is permitted, the regulation must achieve an accommodation between the Puyallups' net-fishing rights and the rights of sports fishermen. Pp. 45–49.

80 Wash. 2d 561, 497 P. 2d 171, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 49.

Joseph L. Coniff, Jr., Assistant Attorney General of Washington, argued the cause for petitioner in No. 72–481 and for respondent in No. 72–746. With him on the brief was *Slade Gorton*, Attorney General.

Harry R. Sachse argued the cause for respondents in No. 72–481 and for petitioner in No. 72–746. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Johnson, Deputy Solicitor General Wallace, Edmund B. Clark*, and *Glen R. Goodsell.*†

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*Together with No. 72–746, *Puyallup Tribe* v. *Department of Game of Washington*, also on certiorari to the same court.

†*Charles A. Hobbs* filed a brief for the National Congress of American Indians, Inc., et al. as *amici curiae* urging reversal in No. 72–746. Briefs of *amici curiae* in both cases were filed by *James B. Hovis* for the Confederated Bands and Tribes of the Yakima Indian Nation, and by *David H. Getches* for Ramona C. Bennett et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought this action against the Puyallup Tribe and some of its members, claiming they were subject to the State's laws that prohibited net fishing at their usual and accustomed places and seeking to enjoin them from violating the State's fishing regulations. The Supreme Court of the State held that the tribe had protected fishing rights under the Treaty of Medicine Creek and that a member who was fishing at a usual and accustomed fishing place of the tribe may not be restrained or enjoined from doing so unless he is violating a state statute or regulation "which has been established to be reasonable and necessary for the conservation of the fishery." 70 Wash. 2d 245, 262, 422 P. 2d 754, 764.

On review of that decision we held that, as provided in the Treaty of Medicine Creek, the " 'right of taking fish, at all usual and accustomed grounds and stations [which] is . . . secured to said Indians, in common with all citizens of the Territory' " extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S. 392, 395, 398. We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase 'in common with' " as used in the Treaty. *Id.*, at 400, 403.

In Washington the Department of Fisheries deals with salmon fishing, while steelhead trout are under the jurisdiction of the Department of Game. On our remand the Department of Fisheries changed its regulation to allow Indian net fishing for salmon in the Puyallup River (but not in the bay or in the spawning areas of the river). The Department of Game, however, continued its total prohibition of net fishing for steelhead trout. The Supreme Court of Washington upheld the regulations imposed by the Department of Fisheries which, as noted, were applicable to salmon; and no party has brought that ruling back here for review. The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steelhead trout. We granted the petitions for certiorari. 410 U. S. 981.

The Supreme Court of Washington, while upholding the regulations of the Department of Game prohibiting fishing by net for steelhead in 1970, 80 Wash. 2d 561, 497 P. 2d 171, held (1) that new fishing regulations for the Tribe must be made each year, supported by "facts and data that show the regulation is necessary for the conservation" of the steelhead, *id.*, at 576, 497 P. 2d, at 180; (2) that the prohibition of net fishing for steelhead was proper because "the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river." *Id.*, at 573, 497 P. 2d, at 178–179.

The ban on all net fishing in the Puyallup River for steelhead [1] grants, in effect, the entire run to the sports

[1] "ANNUAL CATCH LIMIT—STEELHEAD ONLY: Thirty steelhead over 20″ in length . . . ." 1970 Game Fish Seasons and Catch Limits 3 (Dept. of Game). (Cited at 80 Wash. 2d 561, 572, 497 P. 2d 171, 178.)

fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

We know from the record and oral argument that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. The Washington Supreme Court said:

> "Mr. Clifford J. Millenbac[h], Chief of the Fisheries Management Division of the Department of Game, testified that the run of steelhead in the Puyallup River drainage is between 16,000 and 18,000 fish annually; that approximately 5,000 to 6,000 are native run which is the maximum the Puyallup system will produce even if undisturbed; that approximately 10,000 are produced by the annual hatchery plant of 100,000 smolt; that smolt, small steelhead from 6 to 9 inches in length, are released in April, and make their way to the sea about the first of August; that during this time all fishing is closed to permit their escapement; that the entire cost of the hatchery smolt plant, exclusive of some federal funds, is financed from license fees paid by sports fishermen. The record further shows that 61 per cent of the entire sports catch on the river is from hatchery-planted steelhead; that the catch of steelhead by the sports fishery, as determined from 'card count' received from the licensed sports fishermen, is around 12,000 to 14,000 annually; [2] that the escapement required for adequate hatchery needs and spawning is 25 per cent to 50 per cent of the run; that the steelhead fishery cannot therefore

[2] The Washington Supreme Court noted "that substantially all the steelhead fishery occurs after their entrance into the respective rivers to which they return." 80 Wash. 2d, at 575, 497 P. 2d, at 180.

withstand a commercial fishery on the Puyallup River." *Id.*, at 572, 497 P. 2d, at 178.

At oral argument counsel for the Department of Game represented that the catch of steelhead that were developed from the hatchery program was in one year 60% of the total run and in another 80%. And he stated that approximately 80% of the cost of that program was financed by the license fees of sports fishermen. Whether that issue will emerge in this ongoing litigation as a basis for allocating the catch between the two groups, we do not know. We mention it only to reserve decision on it.

At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. Our prior decision recognized that net fishing by these Indians for commercial purposes was covered by the Treaty. 391 U. S., at 398–399. We said that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation . . . does not discriminate against the Indians." *Id.*, at 398. There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed.

Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with

nets, the places where nets can be located, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

We reverse the judgment below insofar as it treats the steelhead problem and remand the cases for proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring.

I agree that, consistently with the Treaty, commercial fishing by Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights

extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

Syllabus

KUSPER ET AL. *v.* PONTIKES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 71–1631. Argued October 9, 1973—Decided November 19, 1973

Appellee, a qualified Chicago voter who voted in a February 1971 Republican primary involving nominations for municipal officers, challenges the constitutionality of § 7–43 (d) of the Illinois Election Code, under which she was barred from voting in a March 1972 Democratic primary. Section 7–43 (d) prohibits a person from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months, an exception being made if the primary is of a "political party within a city . . . only." Appellants contended, *inter alia*, that the three-judge District Court, which held the statute invalid, should have abstained because the state courts might have found the statutory exception applicable to the 1971 primary. *Held:*

1. The District Court did not err in declining to abstain from making a constitutional ruling in view of an Illinois Supreme Court adjudication confining the statutory exception to political parties entitled to nominate *only* for city offices and making it inapplicable to the Democratic and Republican parties. Appellee is thus not relieved of the bar of the 23-month rule. Pp. 53–56.

2. Section 7–43 (d) unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments by "locking" the voter in his pre-existing party affiliation for a substantial period of time following his participation in any primary election, and the State's legitimate interest in preventing party "raiding" cannot justify the substantial restraint of the 23-month rule. *Rosario* v. *Rockefeller*, 410 U. S. 752, distinguished. Pp. 56–61.

345 F. Supp. 1104, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., concurred in the result. BLACKMUN, J., filed a dissenting opinion, *post*, p. 61. REHNQUIST, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 65.

Aldus S. Mitchell argued the cause for appellants. With him on the briefs were *William R. Ming, Jr.*, and *Sophia H. Hall.*

Ray Jeffrey Cohen argued the cause and filed a brief for appellee.

MR. JUSTICE STEWART delivered the opinion of the Court.

Under § 7–43 (d) of the Illinois Election Code, a person is prohibited from voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months.[1] Appellee, Harriet G. Pontikes, is a qualified Chicago voter who voted in a Republican primary in February 1971;[2] she wanted to vote in a March 1972 Democratic primary, but was barred from doing so by this 23-month

[1] Ill. Rev. Stat., c. 46, § 7–43 provides, in pertinent part:

"No person shall be entitled to vote at a primary:

. . . . . .

"(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7–2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7–2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held."

[2] The Republican primary in which the appellee voted involved nominations for the offices of mayor, city clerk, and city treasurer of Chicago.

rule.[3] She filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Illinois, alleging that § 7–43 (d) unconstitutionally abridged her freedom to associate with the political party of her choice by depriving her of the opportunity to vote in the Democratic primary. A statutory three-judge court was convened,[4] and held, one judge dissenting, that the 23-month rule is unconstitutional. 345 F. Supp. 1104.[5] We noted probable jurisdiction of this appeal from that judgment. 411 U. S. 915.[6]

I

At the outset, we are met by the appellants'[7] argument that the District Court should have abstained from adjudicating the constitutionality of the 23-month rule. They base this argument upon that portion of § 7–43 (d) which provides that:

> "[P]articipation by a primary elector in a primary of a political party which, under the provisions of Section 7–2 of this Article, is a political party within

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[3] The March 1972 Democratic primary involved, *inter alia*, nominations for Governor, United States Senator, United States Representative, state legislators, county officers, and delegates to the National Convention of the Democratic Party.

[4] 28 U. S. C. §§ 2281, 2284.

[5] The District Court upheld the constitutional validity of Ill. Rev. Stat., c. 46, §§ 7–43 (a) and 7–44, which require a declaration of party affiliation as a prerequisite to voting in a primary election. This holding, which was unanimous, has not been appealed.

[6] This case was consolidated in the District Court with a similar action brought by two other voters against the county clerk of Lake County, Illinois. The defendant in that case has not appealed from the District Court's judgment.

[7] The appellants in this case are members of the Chicago Board of Election Commissioners, who are responsible for administering the provisions of the Illinois Election Code within the city. See Ill. Rev. Stat., c. 46, § 6–21 *et seq.*

> a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party . . . ." Ill. Rev. Stat., c. 46, § 7–43 (d).

The appellants note that the February 1971 Republican primary election in which Mrs. Pontikes voted involved only nominations for the offices of mayor, city clerk, and city treasurer of the city of Chicago. They claim that the state courts might interpret this 1971 primary to have been one of a "political party within a city . . . only," and thus outside the purview of the 23-month rule.

As we stated in *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 509:

> "Abstention is a 'judge-made doctrine . . . , first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, [that] sanctions . . . escape [from immediate decision] only in narrowly limited "special circumstances," *Propper* v. *Clark*, 337 U. S. 472, 492,' *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964)." [8]

The paradigm of the "special circumstances" that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Zwickler* v. *Koota*, 389 U. S. 241, 249; *Harrison* v. *NAACP*, 360 U. S. 167, 176–177. Abstention in such

[8] Bracketed material in original.

circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. *Harman* v. *Forssenius*, 380 U. S. 528, 534. But the doctrine of abstention "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Ibid.* Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to "guard, enforce, and protect every right granted or secured by the Constitution of the United States," *Robb* v. *Connolly*, 111 U. S. 624, 637.

We think that the Illinois statute involved in this case is not fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. The appellants' argument—that the February 1971 Chicago Republican primary might be considered that of a "political party within a city . . . only"—is foreclosed by the decision of the Illinois Supreme Court in *Faherty* v. *Board of Election Comm'rs*, 5 Ill. 2d 519, 126 N. E. 2d 235. That decision made it clear that the kind of "local" primaries that are outside the scope of § 7–43 (d) are simply those of " 'purely city . . . political part[ies]' "—those parties entitled, under § 7–2 of the Illinois Election Code, to make nominations for city offices *only*. *Id.*, at 524, 126 N. E. 2d, at 238.[9]

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[9] Ill. Rev. Stat., c. 46, § 7–2 defines the term "political party" under Illinois law, and states the offices for which various types of political parties are entitled to make nominations. Under § 7–2, a party that garners more than 5% of the entire vote cast at a statewide general election is defined as a "political party within the State," and is entitled to make nominations for all state and county offices in the next succeeding primary. Similarly, a party that polls more than 5% of the entire vote cast at a munic-

Since both the Democratic and Republican parties are, of course, entitled in Illinois to make nominations not only for city offices, but for congressional, state, and county offices as well, the *Faherty* court held that they were not within the statutory definition of "city" parties. It follows then, that despite the fact that the February 1971 Republican primary in which the appellee voted involved only nominations for offices within the city of Chicago, Mrs. Pontikes was still clearly barred by the 23-month rule from voting in the March 1972 Democratic primary.[10] The District Court was thus wholly justified in declining to abstain from deciding the constitutional validity of the 23-month rule, and it is to that issue that we now turn.

II

There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group

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ipal general election is defined as a "political party within . . . [a] city," and is entitled to make nominations for city elective positions at the next succeeding primary.

Under § 7–43 (d), a "political party within a city . . . only" is one that has qualified under § 7–2 to make only city nominations; in other words, a party that has polled more than 5% of the vote at the preceding municipal general election, but less than 5% of the vote at the preceding statewide general election. Obviously, the Republican party, in whose 1971 Chicago primary the appellee voted, does not fit within this description.

[10] It is true, as the appellants argue, that the plaintiff in *Faherty* v. *Board of Election Comm'rs*, 5 Ill. 2d 519, 126 N. E. 2d 235, wished to vote in a Chicago Democratic primary after having voted, within the past year, in a statewide Republican primary; thus, the factual setting in *Faherty* was precisely the converse of that here. This, however, is a distinction without a difference. The holding of *Faherty* was that Republican and Democratic primaries, even those involving only citywide offices, were not primaries of political parties "within a city . . . only." See n. 9, *supra*. Thus, these primaries are fully within the purview of the § 7–43 (d) 23-month rule.

activity" protected by the First and Fourteenth Amendments. *NAACP* v. *Button,* 371 U. S. 415, 430; *Bates* v. *Little Rock,* 361 U. S. 516, 522–523; *NAACP* v. *Alabama,* 357 U. S. 449, 460–461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams* v. *Rhodes,* 393 U. S. 23, 30. Cf. *United States* v. *Robel,* 389 U. S. 258.

To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States.[11] But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330; *Kramer* v. *Union School District,* 395 U. S. 621; *Carrington* v. *Rash,* 380 U. S. 89. As the Court made clear in *Williams* v. *Rhodes, supra,* unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. 393 U. S., at 30. And see *id.,* at 35–41 (DOUGLAS, J., concurring); *id.,* at 41–48 (Harlan, J., concurring).

There can be little doubt that § 7–43 (d) substantially restricts an Illinois voter's freedom to change his political party affiliation. One who wishes to change his party registration must wait almost two years before his choice will be given effect. Moreover, he is forced to forgo participation in any primary elections occurring within the statutory 23-month hiatus. The effect of the Illinois statute is thus to "lock" the voter into his pre-existing party affiliation for a substantial period of time following participation in any primary election, and each succeeding primary vote extends this period of confinement.

[11] See Art. I, § 2; Art. II, § 1. With respect to elections to federal office, however, the Court has held that Congress has power to establish voter qualifications. *Oregon* v. *Mitchell,* 400 U. S. 112.

The 23-month rule does not, of course, deprive those in the appellee's position of all opportunities to associate with the political party of their choice. But neither did the state attempts to compel disclosure of NAACP membership lists in *Bates* v. *Little Rock* and *NAACP* v. *Alabama* work a total restriction upon the freedom of the organization's members to associate with each other. Rather, the Court found in those cases that the statutes under attack constituted a "substantial restraint" [12] and a "significant interference" [13] with the exercise of the constitutionally protected right of free association.

The same is true of § 7–43 (d). While the Illinois statute did not absolutely preclude Mrs. Pontikes from associating with the Democratic party, it did absolutely preclude her from voting in that party's 1972 primary election. Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.

III

As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Bates* v. *Little Rock, supra,* at 524; *NAACP* v. *Alabama, supra,* at 463. For even when

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[12] *NAACP* v. *Alabama,* 357 U. S. 449, 462.

[13] *Bates* v. *Little Rock,* 361 U. S. 516, 523.

pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* v. *Blumstein,* 405 U. S., at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S., at 438. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton* v. *Tucker,* 364 U. S. 479, 488.

The appellants here urge that the 23-month rule serves the purpose of preventing "raiding"—the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results. It is said that our decision in *Rosario* v. *Rockefeller,* 410 U. S. 752, recognized the state interest in inhibiting "raiding," and upheld the constitutional validity of legislation restricting a voter's freedom to change parties, enacted as a means of serving that interest.

It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute [14] under review in *Rosario.* That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary, and thus prevented a change in party affiliation during the approximately 11 months between the deadline and the primary election.[15] It is also true that the Court recognized in *Rosario* that a State may have a legitimate interest in seeking to curtail "raiding," since that practice may

[14] N. Y. Election Law § 186.

[15] New York presidential primaries are held in June; thus, in presidential election years, the cutoff date prescribed by § 186 occurs about eight months before the primary. *Rosario* v. *Rockefeller,* 410 U. S. 752, 760.

affect the integrity of the electoral process. *Id.*, at 761. But it does not follow from *Rosario* that the Illinois statutory procedures also pass muster under the Fourteenth Amendment, for the Illinois Election Code differs from the New York delayed-enrollment law in a number of important respects.

The New York statute at issue in *Rosario* did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. Under the New York law, a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election. The New York law did not have the consequence of "locking" a voter into an unwanted party affiliation from one election to the next; any such confinement was merely the result of the elector's voluntary failure to take timely measures to enroll. *Id.*, at 757–759. The Court therefore concluded that the New York delayed-enrollment law did not prevent voters "from associating with the political party of their choice." *Id.*, at 762. And see *id.*, at 758 and n. 8.

The basic difference in the Illinois law is obvious. Since the appellee here voted in the 1971 Republican primary, the state law absolutely precluded her from participating in the 1972 Democratic primary. Unlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary.[16] The Illinois law, unlike that of

[16] She could, of course, have made herself eligible to vote in the 1972 Democratic primary by forgoing participation in the 1971 Republican primary. But such a course would have prevented her from associating with the party of her choice in 1971, and thus

New York, thus "locks" voters into a pre-existing party affiliation from one primary to the next, and the only way to break the "lock" is to forgo voting in *any* primary for a period of almost two years.

In other words, while the Court held in *Rosario* that the New York delayed-enrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-month rule clearly does just that. It follows that the legitimate interest of Illinois in preventing "raiding" cannot justify the device it has chosen to effect its goal. For that device conspicuously infringes upon basic constitutional liberty. Far from supporting the validity of the Illinois legislation, the Court's decision in *Rosario* suggests that the asserted state interest can be attained by "less drastic means," which do not unnecessarily burden the exercise of constitutionally protected activity.

We conclude, therefore, that § 7–43 (d) of the Illinois Election Code unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments. The judgment of the District Court is accordingly

Affirmed.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE BLACKMUN, dissenting.

The deprivation Mrs. Pontikes claims to have suffered, and which the Court today enshrouds with the mantle of unconstitutionality, is that she has been restrained by the Illinois statute from voting in *one* primary election of *one* party in the relatively minor context of a personal desire to undo an established party affiliation. Apart from this meager restraint, appellee Pontikes is

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in no way would have obviated the constitutional deficiencies inherent in the Illinois law.

fully free to associate with the party of her varying choice. She is, and has been, completely free to vote as she chooses in any general election. And she was free to vote in the primary of the party with which she had affiliated and voted in the preceding primary.

It is important, I think—and deserving of repeated emphasis—to note that this very limited statutory restriction on the appellee's exercise of her franchise is triggered solely by her personal and voluntary decision. This being so, the Court's conclusion seems to me to dilute an important First Amendment concept the vitality of which, in the long run, necessarily will suffer from strained and artificial applications of this kind. The mere fact that a state statute lightly brushes upon the right to vote and the right of association, important as these are, should not automatically result in invalidation. Prior case law does not require a conclusion of invalidity where, as here, the intrusion is so minor. See *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969); *Rosario* v. *Rockefeller,* 410 U. S. 752 (1973).

In nearly all the voting cases relied upon by the Court and by the appellee, the Court was faced with situations where the disqualification amounted to a direct disenfranchisement or a vote dilution suffered by a discrete class whose impediment, as so imposed, was the result of an involuntary condition not directly tied to the franchise. See, for example, *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966) (poll tax and wealth); *Reynolds* v. *Sims,* 377 U. S. 533 (1964) (location); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969) (property ownership); *Carrington* v. *Rash,* 380 U. S. 89 (1965) (military status). Cf. *Dunn* v. *Blumstein,* 405 U. S. 330 (1972) (residence). In each of these cases there was a direct impairment of the ability of the affected class, without voluntary action, to participate in the electoral process. The level of intrusion was markedly significant.

What is before us here is a fairly complex statutory structure designed by Illinois to protect the integrity of the ballot box and the party system. The interest asserted by the State is clearly a legitimate one. *Rosario* v. *Rockefeller,* 410 U. S., at 761; *Dunn* v. *Blumstein,* 405 U. S., at 345; *Bullock* v. *Carter,* 405 U. S. 134, 145 (1972). And, it seems to me, means of the kind Illinois has employed are reasonably related to the fulfillment of that interest. The extent to which organized party raiding can disrupt, with unfortunate results, the orderly process of party primary balloting is, perhaps, open to reasonable differences of opinion. Indeed, in this case the parties have joined issue as to the precise degree of impact this practice has had in recent Illinois elections. Regardless of which factual version is to be credited, the legitimacy of the interest is unquestioned. With respect to a State like Illinois, where party regimentation on an extensive scale is legendary, the Court, in my view, should move cautiously when it is tempted to pass judgment in terms of assuming that there is a better or a less drastic means by which the State is able to achieve its admittedly laudable and lawful purpose.

By resorting to a standard of rigid and strict review, and by indulging in what I fear is a departure from the appropriately deferential approach in *Rosario,* the Court places itself in the position of failing to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them that are associated with the preservation of the integrity of the franchise. Cf. *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970); *Burns* v. *Fortson,* 410 U. S. 686, 687 (1973) (concurring opinion). Surely, at some point, the important interest of the State in protecting its entire electoral system outweighs a minor

and incidental burden that happens to fall on a few uniquely situated citizens.

The Illinois Legislature has determined that a rule precluding voting in the primaries of different parties in successive annual elections is a desirable and necessary means by which to preserve an otherwise vulnerable structure. In *Rosario,* 410 U. S., at 762, we applied a "particularized legitimate purpose" standard to a similarly directed scheme and upheld the New York statute. As MR. JUSTICE REHNQUIST points out in his dissent, *post,* at 68, the degree of disenfranchisement resulting from the New York provision is potentially as great as, if not greater than, the Illinois provision challenged here. That case and this one, taken together, therefore, effect incongruous results. Not only is the actual disenfranchisement in this case no greater than that in *Rosario,* but the Illinois provision has a more rational relation to its purpose than does the New York provision. The New York statute specified an arbitrary time period prior to which it is assumed that organized party switching for raiding purposes will not occur. In contrast, Illinois chose not to employ a flat time limit that is by nature speculative and arbitrary; instead, it tied its disqualification directly to a significant event, namely, a vote in another party's last primary. Seemingly, the 23-month period was chosen so that the limitation would not extend back beyond the most recent primary. When primaries are held annually, the 23-month period amounts to no more than a one-year limitation, and in this respect the statute is drawn as narrowly as can be expected for a system that is tied to a prior primary vote rather than a designated time period. By tying the cutoff to a primary, the Illinois scheme seems directly designed to succeed in preventing organized crossovers, for it is highly unlikely that any significant number of party regulars would ever be instructed not to vote at all in

one primary in order to subvert the next one that will not be held for another year.

MR. JUSTICE REHNQUIST also observes that the Illinois system does have the side effect of creating a *per se* exclusion for a few voters. It is this factor, apparently, that has caused the Court to seek to distinguish *Rosario*. In New York the disqualification occasioned by the time limit will have its impact, more often than not, upon those who have not been diligent. This, indeed, was the very situation in *Rosario*. The Illinois provision, on the other hand, affects only party switchers. And they clearly are the group most amenable to organized raiding. I do not agree that any marginal difference that may exist between the New York rule and the Illinois rule must have the effect of transforming a "legitimate time limitation," *Rosario*, 410 U. S., at 762, into an unconstitutional denial of freedom of association. This incongruity underscores what I believe to be the potential mischief that results from an easy and all-too-ready resort to a strict-scrutiny standard in election cases of this kind. To be sure, the line between constitutionality and unconstitutionality must be drawn somewhere. But I would not draw it short of what Illinois has done here.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court decides that the Illinois rule disqualifying a person from voting in the primary of one political party if he has voted in the primary of another political party during the preceding 23 months imposes an impermissible burden on Illinois voters' exercise of their right of free political association. In so doing it distinguishes *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), decided last Term. I find *Rosario* more difficult to distinguish than does the Court.

Section 7–43 of the Illinois Election Code provides that every person eligible to register to vote is entitled to vote at primary elections; it goes on to set out a number of exceptions to that general entitlement, including both persons disqualified under the 23-month rule challenged in this case and persons disqualified because they refuse to declare a party affiliation.[1] Section 7–44 re-

[1] Ill. Rev. Stat., c. 46, § 7–43, provides:

"Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years, shall be entitled to vote at such primary.

"The following regulations shall be applicable to primaries:

"No person shall be entitled to vote at a primary:

"(a) Unless he declares his party affiliations as required by this Article;

"(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

"(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

"(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7–2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7–2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month [in which such primary] in which he seeks to participate is held.

"(e) In cities, villages and incorporated towns having a board

quires a primary voter to declare his party affiliation to the primary judges at the polling place; it further provides that, if challenged, the voter must establish his right to vote.[2] Section 7–45 requires a challenged voter to supply an affidavit, in a statutorily prescribed form, to establish that he is entitled to vote under § 7–43. The affidavit states, *inter alia,* that the affiant has not voted in the primary of any other political party within the forbidden 23-month period.

The Illinois system of primary elections, unlike the New York system before the Court in *Rosario,* does not require a voter to have enrolled as a member of a party months in advance in order to be eligible to vote in that party's primary. Illinois provides instead for a declara-

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of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

"(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Article 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held."

[2] Ill. Rev. Stat., c. 46, § 7–44 provides: "Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When article 4, 5 or 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary."

tion of party affiliation at the primary polling place. And Illinois, not surprisingly in view of its different primary system, has chosen another way to protect its interest in preventing "raiding" than has New York. It is true, as the Court makes clear, that the Illinois rule requires a voter affiliated with one party to sit out primaries during a period of 23 months in order to effectuate a switch in affiliation to another party and qualify to vote in its primaries. In this respect Illinois' rule imposes a greater burden on its voters' associational freedom than does New York's, since in New York a sufficiently prescient and diligent voter can vote in a different party's primary every year. Of course, it cannot be said whether the Illinois appellee here underwent her change in party loyalty in time, and would have taken the necessary steps to enroll, had Illinois had New York's rule.

On the other hand, Illinois' rule imposes a lesser burden on its previously unaffiliated voters than does New York's. Indeed, it imposes a lesser burden on any voter who has, for whatever reason, failed to vote in the primary of another party within the past 23 months. Such voters are not required to foresee their interest in the primary by eight or more months, as are New York voters under the rule upheld in *Rosario*. As a practical matter, a voter is not required to swear that he has not participated in the primary of another party as a condition of his right to vote unless he is challenged. In these respects the Illinois rule is more closely tailored to the State's interest in preventing "raiding" than is the New York rule. Voters who have recently demonstrated loyalty to another party by voting in its primary, are more likely than those who have not to engage in "raiding." Moreover, challenges for violations of the 23-month rule are not likely to be made where no serious danger of "raiding" is perceived.

Both the Illinois rule struck down today and the New York rule upheld in *Rosario* restrict voters' freedom to associate with the political party of their choice. In both instances the State has sought to justify the restrictions as promoting the State's legitimate interest in preventing "raiding." While neither rule is perfectly fashioned to accomplish that and no other result, I cannot conclude that the Illinois rule imposes a significantly greater burden on the exercise of associational freedom than does the New York rule we upheld last Term in *Rosario*.

LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* TURLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 72-331. Argued October 10, 1973—Decided November 19, 1973

New York statutes require public contracts to provide that if a contractor refuses to waive immunity or to testify concerning his state contracts, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years, and further require disqualification from contracting with public authorities upon a person's failure to waive immunity or answer questions respecting his state transactions. Appellees, New York-licensed architects, when summoned to testify before a grand jury investigating various criminal charges, refused to sign waivers of immunity, whereupon various contracting authorities were notified of appellees' conduct and had their attention called to the applicable disqualification statutes. Appellees thereafter brought this action challenging the statutes as violative of their constitutional privilege against compelled self-incrimination. A three-judge District Court declared the statutes unconstitutional under the Fourteenth and Fifth Amendments. *Held:*

1. The Fifth Amendment privilege against self-incrimination is not inapplicable simply because the issue arises in the context of official inquiries into the job performance of a public contractor. The ordinary rule is that the privilege is available to witnesses called before a grand jury as these appellees were, and the State's legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors, like other state concerns, cannot override the requirements of the Fifth Amendment. Pp. 77–79.

2. The State could not compel testimony that had not been immunized and the waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device, *Garrity* v. *New Jersey*, 385 U. S. 493; *Gardner* v. *Broderick*, 392 U. S. 273; *Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280, and there is no constitutional distinction in terms of compulsion between the threat of job loss in those cases and the threat of contract loss to a contractor. Pp. 79–84.

3. Under a proper accommodation between the interest of the State and the Fifth Amendment, the State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant their Fifth Amendment privilege. *Kastigar* v. *United States,* 406 U. S. 441. Pp. 84–85.

342 F. Supp. 544, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in which BRENNAN, J., joined by a separate qualifying opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 85.

Brenda Soloff, Assistant Attorney General of New York, argued the cause for appellants. With her on the brief for appellants Lefkowitz et al. were *Louis J. Lefkowitz,* Attorney General, *pro se,* and *Samuel A. Hirshowitz,* First Assistant Attorney General. A separate brief was filed for appellant Tutuska.

Richard O. Robinson argued the cause and filed a brief for appellees.

MR. JUSTICE WHITE delivered the opinion of the Court.

New York General Municipal Law §§ 103–a and 103–b and New York Public Authorities Law §§ 2601 and 2602 require public contracts to provide that if a contractor refuses to waive immunity or to answer questions when called to testify concerning his contracts with the State or any of its subdivisions, his existing contracts may be canceled and he shall be disqualified from further transactions with the State for five years.[1] In addition to

[1] N. Y. Gen. Munic. Law §§ 103–a and 103–b (Supp. 1973–1974) provide:

Section 103–a. Ground for cancellation of contract by municipal corporations and fire districts:

"A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen

specifying these contract terms, the statutes require disqualification from contracting with public authorities upon failure of any person to waive immunity or to

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hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, . . . head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

"(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

"(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

"The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corpora-

answer questions with respect to his transactions with the State or its subdivisions. The issue in this case is whether these sections are consistent with the Four-

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tion on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty."

Section 103–b. Disqualification to contract with municipal corporations and fire districts:

"Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, . . . head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

"It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, . . . the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of

teenth Amendment insofar as it makes applicable to the States the Fifth Amendment privilege against compelled self-incrimination.

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this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein."

N. Y. Pub. Auth. Law §§ 2601 and 2602 (Supp. 1973–1974) provide:

Section 2601. Ground for cancellation of contract by public authority:

"A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, . . . head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

"(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

"(b) any and all contracts made with any public authority or

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Appellees are two architects licensed by the State of New York. They were summoned to testify before a grand jury investigating various charges of conspiracy,

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official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid."

Section 2602. Disqualification to contract with public authority:

"Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, . . . head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

"It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, . . . the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate

bribery, and larceny. They were asked, but refused, to sign waivers of immunity, the effect of which would have been to waive their right not to be compelled in a criminal case to be a witness against themselves. They were then excused and the District Attorney, as directed by law, notified various contracting authorities of appellees' conduct and called attention to the applicable disqualification statutes. Appellees thereupon brought this action alleging that their existing contracts and future contracting privileges were threatened and asserted that the pertinent statutory provisions were violative of the constitutional privilege against compelled self-incrimination. A three-judge District Court was convened and declared the four statutory provisions at issue unconstitutional under the Fourteenth and Fifth Amendments, 342 F. Supp. 544 (WDNY 1972). We noted probable jurisdiction, 410 U. S. 924 (1973). The State appealed pursuant to 28 U. S. C. § 1253. We affirm the judgment of the District Court.

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departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons [*sic*] so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein."

II

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924), squarely held that

> "[t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

In this respect, *McCarthy* v. *Arndstein* reflected the settled view in this Court. The object of the Amendment "was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). See also *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897); *Brown* v. *Walker*, 161 U. S. 591 (1896); *Boyd* v. *United States*, 116 U. S. 616, 634, 637–638 (1886); *United States* v. *Saline Bank*, 1 Pet. 100 (1828). This is the rule that is now applicable to the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). "It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries."

Id., at 11. In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States*, 406 U. S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram* v. *United States, supra; Boyd* v. *United States, supra.*

Against this background, there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor. Surely, the ordinary rule is that the privilege is available to witnesses called before grand juries as these appellee architects were. *Hale* v. *Henkel*, 201 U. S. 43, 66 (1906).

It is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services; and New York would have it that this interest is sufficiently strong to override the privilege. The suggestion is that the State should be able to interrogate employees and contractors about their job performance without regard to the Fifth Amendment, to discharge those who refuse to answer or to waive the privilege by waiving the immunity to which they would otherwise be entitled, and to use any incriminating answers obtained in subsequent criminal prosecutions. But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well.

In *McCarthy* v. *Arndstein, supra,* the United States insisted that because of the strong public interest in marshaling and distributing assets of bankrupts, the

Fifth Amendment should not protect a bankrupt during the official examinations mandated by the Bankruptcy Act. That position did not prevail. The bankrupt's testimony could be had, but only if he were afforded sufficient immunity to supplant the privilege. And long before *McCarthy* v. *Arndstein,* the Court recognized that without the compelled testimony of knowledgeable and perhaps implicated witnesses, the enforcement of the transportation laws "would become impossible," but nevertheless proceeded on a basis that witnesses must be granted adequate immunity if their evidence was to be compelled. *Brown* v. *Walker,* 161 U. S., at 610. Similarly, the enforcement of the antitrust laws against private corporations was at stake in *Hale* v. *Henkel, supra,* but immunity was essential to command the testimony of individual witnesses. Also, it would be difficult to overestimate the importance of the interest of the States in the enforcement of their ordinary criminal laws; but the price for incriminating answers from third-party witnesses is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination. Finally, in almost the very context here involved, this Court has only recently held that employees of the State do not forfeit their constitutional privilege and that they may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions. *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r,* 392 U. S. 280 (1968).

III

In *Garrity* v. *New Jersey,* certain police officers were summoned to an inquiry being conducted by the Attorney General concerning the fixing of traffic tickets.

They were asked questions following warnings that if they did not answer they would be removed from office and that anything they said might be used against them in any criminal proceeding. No immunity of any kind was offered or available under state law. The questions were answered and the answers later used over their objections, in their prosecutions for conspiracy. The Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." 385 U. S., at 500. The Court also held that in the context of threats of removal from office the act of responding to interrogation was not voluntary and was not an effective waiver of the privilege against self-incrimination, the Court conceding, however, that there might be other situations "where one who is anxious to make a clean breast of the whole affair volunteers the information." *Id.*, at 499.

The issue in *Gardner* v. *Broderick, supra,* was whether the State might discharge a police officer who, after he was summoned before a grand jury to testify about the performance of his official duties and was advised of his right against compulsory self-incrimination, then refused to waive that right as requested by the State. Conceding that appellant could be discharged for refusing to answer questions about the performance of his official duties, if not required to waive immunity, the Court held that the officer could not be terminated, as he was, for refusing to waive his constitutional privilege. Although under *Garrity* any waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State did not purport to recognize as much and instead

attempted to coerce a waiver on the penalty of loss of employment. The "testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust." 392 U. S., at 279. Hence, the State's statutory provision requiring his dismissal for his refusal to waive immunity could not stand.

The companion case, *Sanitation Men* v. *Sanitation Comm'r, supra,* was to the same effect. Here again, public employees were officially interrogated and advised that refusal to answer and sign waivers of immunity would lead to dismissal. Here again, the Court held that the State presented the employees with "a choice between surrendering their constitutional rights or their jobs," 392 U. S., at 284, although clearly they would "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." *Id.,* at 285.

These cases, and their predecessors, ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination, *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964), and the need of the State, as well as the Federal Government, to obtain information "to assure the effective functioning of government," *id.,* at 93 (WHITE, J., concurring). Immunity is required if there is to be "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar* v. *United States,* 406 U. S., at 446. It is in this sense that immunity

statutes have "become part of our constitutional fabric." *Ullmann* v. *United States*, 350 U. S. 422, 438 (1956).[2]

We agree with the District Court that *Garrity*, *Gardner*, and *Sanitation Men* control the issue now before us. The State sought to interrogate appellees about their transactions with the State and to require them to furnish possibly incriminating testimony by demanding that they waive their immunity and by disqualifying them as public contractors when they refused. It seems to us that the State intended to accomplish what *Garrity* specifically prohibited—to compel testimony that had not been immunized. The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be

[2] In *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), a doctor inducted into the Army was denied a commission as an officer after refusing to divulge whether he was a Communist, as required by a loyalty certificate prescribed for commissioned officers. Instead he asserted his "Federal constitutional privilege" when called upon to answer the question. In holding that the Government was justified in refusing the commission because of the failure to answer, the Court had no occasion to consider whether Orloff would have been exposed to criminal prosecution if he had stated that he was a member of the Communist Party. The case differs significantly from the one before us since the State here asks the architects to affirmatively expose themselves to criminal prosecution by waiving their privilege against self-incrimination, or from *Garrity*, where the threat of criminal prosecution was apparent both from the nature of the proceeding, and the absence of applicable state immunity statutes.

Kimm v. *Rosenberg*, 363 U. S. 405 (1960), is also inapposite. The Court there held that an alien whose deportation had been ordered was ineligible for a discretionary order permitting his voluntary departure, because he had failed to establish that he was not affiliated with the Communist Party. Petitioner's imminent departure from the country, whether it was voluntary or compelled, obviously made the threat of criminal prosecution on the basis of his answer remote.

termed voluntary. As already noted, *Garrity* specifically rejected the claim of an effective waiver when the policemen in that case, in the face of possible discharge, proceeded to answer the questions put to them. 385 U. S., at 498. The same holding is implicit in both *Gardner* and *Sanitation Men*.

The State nevertheless asserts that whatever may be true of state employees, a different rule is applicable to public contractors such as architects. Because independent contractors may not depend entirely on transactions with the State for their livelihood, it is suggested that disqualification from contracting with official agencies for a period of five years is neither compulsion within the meaning of the Fifth Amendment nor a forbidden penalty for refusing to answer questions put to them about their job performance. But we agree with the District Court that "the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights." 342 F. Supp., at 549. We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.[3]

If the argument is that the cost to a contractor is small in comparison to the cost to an employee of losing his job, the premise must be that it is harder for a state employee to find employment in the private sector, than it is for an architect. An architect lives off his contracting fees as surely as a state employee lives off his salary, and fees and salaries may be equally hard to come by in the private sector after sanctions have been taken by

[3] As *Garrity* succinctly put it: "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." 385 U. S. 493, 497 (1967).

the State. In some sense the plight of the architect may be worse, for under the New York statutes it may be that any firm that employs him thereafter will also be subject to contract cancellation and disqualification.[4] A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage.

IV

We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. *Kastigar* v. *United States, supra.* Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment. *Shillitani* v. *United States,* 384 U. S. 364 (1966). Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. By like token, the State may insist that the architects involved in this case either respond to relevant inquiries about the performance of their contracts or suffer cancellation of current relationships and disqualification from contracting with public agencies for an appropriate time in the future. But the State may not insist that appellees

[4] The contract disqualifications apply not only to the person who refuses to waive immunity but also to "any firm, partnership or corporation of which he is a member, partner, director or officer . . . ."

waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join.

I join the Court's opinion in all respects but one. It is my view that immunity which permits testimony to be compelled "if neither it nor its fruits are available for . . . use" in criminal proceedings does not satisfy the privilege against self-incrimination. "I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting.)

ESPINOZA ET VIR *v.* FARAH MANUFACTURING CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-671. Argued October 10-11, 1973—
Decided November 19, 1973

Petitioners, Mr. and Mrs. Espinoza, brought suit after exhausting their administrative remedies with the Equal Employment Opportunity Commission (EEOC), alleging that respondent's refusal to hire Mrs. Espinoza in its San Antonio division because of her Mexican citizenship violated § 703 of Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice for an employer to fail or refuse to hire any individual because of his race, color, religion, sex, or national origin. The District Court granted petitioners' motion for summary judgment, relying primarily on an EEOC guideline providing that a lawful alien resident may not be discriminated against on the basis of citizenship. The Court of Appeals reversed. *Held:* An employer's refusal to hire a person because he is not a United States citizen does not constitute employment discrimination on the basis of "national origin" in violation of § 703. Pp. 88-96.

(a) In light of the statute's legislative history and the long-standing practice of requiring federal employees to be United States citizens, it is clear that Congress did not intend the term "national origin" to embrace citizenship requirements. Pp. 88-91.

(b) The EEOC's guideline, though perhaps significant in a wide range of other situations, does not apply here or support the premise that discrimination on the basis of citizenship is tantamount to discrimination on the basis of national origin, since there is no showing that respondent (96% of whose San Antonio division employees are Mexican-Americans) discriminated against persons of Mexican origin. Pp. 92-95.

(c) Though the Act protects aliens against illegal discrimination because of race, color, religion, sex, or national origin, it does not proscribe discrimination on the basis of alienage. P. 95.

462 F. 2d 1331, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which

BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 96.

George Cooper argued the cause for petitioners. With him on the briefs was *Ruben Montemayor*.

Kenneth R. Carr argued the cause for respondent. With him on the brief were *Jack T. Chapman* and *William Duncan*.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves interpretation of the phrase "national origin" in Tit. VII of the Civil Rights Act of 1964. Petitioner Cecilia Espinoza is a lawfully admitted resident alien who was born in and remains a citizen of Mexico. She resides in San Antonio, Texas, with her husband, Rudolfo Espinoza, a United States citizen. In July 1969, Mrs. Espinoza sought employment as a seamstress at the San Antonio division of respondent Farah Manufacturing Co. Her employment application was rejected on the basis of a longstanding company policy against the employment of aliens. After exhausting their administrative remedies with the Equal Employment Opportunity Commission,[1] petitioners commenced this suit in the District Court alleging that respondent had discriminated against Mrs. Espinoza because of her "national origin" in violation of § 703 of Tit. VII, 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(1). The District Court granted petitioners' motion for summary judgment, hold-

*Briefs of *amici curiae* urging reversal were filed by *Joseph T. Eddins, Jr.*, and *Beatrice Rosenberg* for the Equal Employment Opportunity Commission; by *Mario G. Obledo* and *Sanford Jay Rosen* for the Mexican American Legal Defense and Educational Fund; and by *Kenneth Hecht* for the Employment Law Center.

[1] Section 706 (c), 42 U. S. C. § 2000e–5 (e).

ing that a refusal to hire because of lack of citizenship constitutes discrimination on the basis of "national origin." 343 F. Supp. 1205. The Court of Appeals reversed, concluding that the statutory phrase "national origin" did not embrace citizenship. 462 F. 2d 1331. We granted the writ to resolve this question of statutory construction, 411 U. S. 946, and now affirm.

Section 703 makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." Certainly the plain language of the statute supports the result reached by the Court of Appeals. The term "national origin" on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.[2]

The statute's legislative history, though quite meager

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[2] See, *e. g.*, Minnesota State Act Against Discrimination, Minn. Stat. § 363.01, subd. 6 (1971), defining "national origin" as "the place of birth of an individual or of any of his lineal ancestors."

Several States have statutes making it illegal to discriminate on the basis of national origin, and many of these statutes have apparently been interpreted by the appropriate state enforcement agency as not barring citizenship requirements. For example, the New York Human Rights Law provides that it is an unlawful discriminatory practice to refuse to hire any individual because of his or her origin and additionally provides that it shall be unlawful for an employer to make any pre-employment inquiry "which expresses directly or indirectly, any limitation, specification or discrimination as to . . . national origin . . . ." N. Y. Exec. Law § 296 (1972). The New York State Commission Against Discrimination has ruled that an employer may lawfully ask a job applicant whether he or she is a citizen of the United States. See 3 CCH Employment Prac. Guide ¶ 26,051, p. 8899.

While these interpretations of state statutes do not control our construction of federal law, we think them indicative of a general understanding that the term "national origin" does not embrace a requirement of United States citizenship.

in this respect, fully supports this construction. The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: "It means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country." 110 Cong. Rec. 2549 (1964). We also note that an earlier version of § 703 had referred to discrimination because of "race, color, religion, national origin, or *ancestry*." H. R. 7152, 88th Cong., 1st Sess., § 804, Oct. 2, 1963 (Comm. print) (emphasis added). The deletion of the word "ancestry" from the final version was not intended as a material change, see H. R. Rep. No. 914, 88th Cong., 1st Sess., 87 (1963), suggesting that the terms "national origin" and "ancestry" were considered synonymous.

There are other compelling reasons to believe that Congress did not intend the term "national origin" to embrace citizenship requirements. Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment. Exec. Order No. 1997, H. R. Doc. No. 1258, 63d Cong., 3d Sess., 118 (1914); see 5 U. S. C. § 3301; 5 CFR § 338.101 (1972). But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various Executive Orders have expressly prohibited discrimination on the basis of national origin in Federal Government employment. See, *e. g.*, Exec. Order No. 9346, 3 CFR 1280 (Cum. Supp. 1938–1943); Exec. Order No. 11478, 3 CFR 446 (1970).

Moreover, § 701 (b) of Tit. VII, in language closely paralleling § 703, makes it "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin . . . ." Civil Rights Act of 1964, Pub. L. 88–352, § 701 (b), 78 Stat. 254, re-enacted, Pub. L. 89–554, 80 Stat. 523, 5 U. S. C. § 7151. The legislative history of that section reveals no mention of any intent on Congress' part to reverse the longstanding practice of requiring federal employees to be United States citizens. To the contrary, there is every indication that no such reversal was intended. Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Government Appropriation Act, 1973, for example, provides that "no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States . . . ." [3] Pub. L. 92–351, § 602, 86 Stat. 487. See also Pub. L. 91–144, § 502, 83 Stat. 336; Pub. L. 91–439, § 502, 84 Stat. 902.

To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find

[3] Petitioners argue that it is unreasonable to attribute any great significance to these provisions in determining congressional intent because the barrier to employment of noncitizens has been tucked away in appropriations bills rather than expressed in a more affirmative fashion. We disagree. Indeed, the fact that Congress has occasionally enacted exceptions to the general barrier indicates to us that Congress was well aware of what it was doing. See, *e. g.*, Pub. L. 92–204, § 703, 85 Stat. 726 (Dept. of Defense); Pub. L. 91–382, 84 Stat. 823 (Library of Congress).

such a breach of faith. See *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 38 (1895). So far as federal employment is concerned, we think it plain that Congress has assumed that the ban on national-origin discrimination in § 701 (b) did not affect the historical practice of requiring citizenship as a condition of employment. See *First National Bank* v. *Missouri,* 263 U. S. 640, 658 (1924). And there is no reason to believe Congress intended the term "national origin" in § 703 to have any broader scope. Cf. *King* v. *Smith,* 392 U. S. 309, 330–331 (1968).

Petitioners have suggested that the statutes and regulations discriminating against noncitizens in federal employment are unconstitutional under the Due Process Clause of the Fifth Amendment. We need not address that question here,[4] for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment. Suffice it to say that we cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of federal employment and, at the same time, prevent private employers from doing likewise. Interpreting § 703 as petitioners suggest would achieve the rather bizarre result of preventing Farah from insisting on United States citizenship as a condition of employment while the very agency charged with enforcement of Tit. VII would itself be required by Congress to place such a condition on its own personnel.

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[4] We left this question undecided in *Sugarman* v. *Dougall,* 413 U. S. 634, 646 n. 12 (1973). See *Jalil* v. *Hampton,* 148 U. S. App. D. C. 415, 460 F. 2d 923, cert. denied, 409 U. S. 887 (1972); *Mow Sun Wong* v. *Hampton,* 333 F. Supp. 527 (ND Cal. 1971).

The District Court drew primary support for its holding from an interpretative guideline issued by the Equal Employment Opportunity Commission which provides:

> "Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship . . . ." 29 CFR § 1606.1 (d) (1972).

Like the Court of Appeals, we have no occasion here to question the general validity of this guideline insofar as it can be read as an expression of the Commission's belief that there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin. In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national-origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971).

It is equally clear, however, that these principles lend no support to petitioners in this case. There is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin.[5] It is con-

[5] There is no suggestion, for example, that the company refused to hire aliens of Mexican or Spanish-speaking background while

ceded that Farah accepts employees of Mexican origin, provided the individual concerned has become an American citizen. Indeed, the District Court found that persons of Mexican ancestry make up more than 96% of the employees at the company's San Antonio division, and 97% of those doing the work for which Mrs. Espinoza applied. While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought. She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship. In fact, the record shows that the worker hired in place of Mrs. Espinoza was a citizen with a Spanish surname.

The Commission's guideline may have significance for a wide range of situations, but not for a case such as this where its very premise—that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out.[6] It is

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hiring those of other national origins. Respondent's president informed the EEOC's Regional Director investigating the charge that once in its history the company had made a single exception to its policy against hiring aliens, but the nationality of the individual concerned is not revealed in the record. While the company asks job applicants whether they are United States citizens, it makes no inquiry as to their national origin.

[6] It is suggested that a refusal to hire an alien always disadvantages that person because of the country of his birth. A person born in the United States, the argument goes, automatically obtains citizenship at birth, while those born elsewhere can acquire citizenship only through a long and sometimes difficult process. See 8 U. S. C. §§ 1423 (1), 1423 (2), 1427 (a), and 1430. The answer to this argument is that it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself, through laws enacted pursuant to its constitutional power

also significant to note that the Commission itself once held a different view as to the meaning of the phrase "national origin." When first confronted with the question, the Commission, through its General Counsel, said: " 'National origin' refers to the country from which the individual or his forebears came . . . , not to whether or not he is a United States citizen . . . ." EEOC General Counsel's Opinion Letter, 1 CCH Employment Prac. Guide ¶ 1220.20 (1967).[7] The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, *Griggs* v. *Duke Power Co., supra,* at 434; *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, 545 (1971) (MARSHALL, J., concurring), but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are "com-

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"[t]o establish an uniform Rule of Naturalization." U. S. Const., Art. 1, § 8, cl. 4.

Petitioners' reliance on *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542 (1971), is misplaced for similar reasons. In *Phillips* we held it unlawful under § 703 to have "one hiring policy for women and another for men . . . ." *Id.,* at 544. Farah, however, does not have a different policy for the foreign born than for those born in the United States. It requires of all that they be citizens of the United States.

[7] The Opinion Letter was addressed to the question whether it was lawful to discriminate against nonresident aliens in favor of citizens and resident aliens, and expressly reserved any decision "regarding discrimination in favor of United States citizens and against resident aliens." Nevertheless, the definition of "national origin" set forth in the Letter is inconsistent with that suggested by petitioners here.

pelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969); see also *Zuber* v. *Allen*, 396 U. S. 168, 193 (1969); *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U. S. 261, 272 (1968).

Finally, petitioners seek to draw support from the fact that Tit. VII protects all individuals from unlawful discrimination, whether or not they are citizens of the United States. We agree that aliens are protected from discrimination under the Act. That result may be derived not only from the use of the term "any individual" in § 703, but also as a negative inference from the exemption in § 702, which provides that Tit. VII "shall not apply to an employer with respect to the employment of aliens outside any State . . . ." 42 U. S. C. § 2000e–1. Title VII was clearly intended to apply with respect to the employment of aliens inside any State.[8]

The question posed in the present case, however, is not whether aliens are protected from illegal discrimination under the Act, but what kinds of discrimination the Act makes illegal. Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.

We agree with the Court of Appeals that neither the language of the Act, nor its history, nor the specific

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[8] "Title VII of the Civil Rights Act of 1964 protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin." 29 CFR § 1606.1 (c) (1972).

facts of this case indicate that respondent has engaged in unlawful discrimination because of national origin.[9]

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

It is odd that the Court which holds that a State may not bar an alien from the practice of law [1] or deny employment to aliens [2] can read a federal statute that prohibits discrimination in employment on account of "national origin" so as to permit discrimination against aliens.

Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be more clear that Farah's policy of excluding aliens is *de facto* a policy of preferring those who were born in this country. Therefore the construction placed upon the "national origin" provision is inconsistent with the construction this Court has placed upon the same Act's protections for persons denied employment on account of race or sex.

In connection with racial discrimination we have said that the Act prohibits "practices, procedures, or tests neutral on their face, and even neutral in terms of intent," if they create "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate in-

[9] Petitioners argue that respondent's policy of discriminating against aliens is prohibited by 42 U. S. C. § 1981, which provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." This issue was neither raised before the courts below nor presented in the petition for a writ of certiorari. Accordingly we express no views thereon.

[1] *In re Griffiths*, 413 U. S. 717 (1973).

[2] *Sugarman* v. *Dougall*, 413 U. S. 634 (1973).

vidiously to discriminate on the basis of racial *or other impermissible classification.*" *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430–431 (1971) (emphasis added). There we found that the employer could not use test or diploma requirements which on their face were racially neutral, when in fact those requirements had a *de facto* discriminatory result and the employer was unable to justify them as related to job performance. The tests involved in *Griggs* did not eliminate all blacks seeking employment, just as the citizenship requirement here does not eliminate all applicants of foreign origin. Respondent here explicitly conceded that the citizenship requirement is imposed without regard to the alien's qualifications for the job.

These petitioners against whom discrimination is charged are Chicanos. But whether brown, yellow, black, or white, the thrust of the Act is clear: alienage is no barrier to employment here. *Griggs*, as I understood it until today, extends its protective principles to all, not to blacks alone. Our cases on sex discrimination under the Act yield the same result as *Griggs*. See *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971).

The construction placed upon the statute in the majority opinion is an extraordinary departure from prior cases, and it is opposed by the Equal Employment Opportunity Commission, the agency provided by law with the responsibility of enforcing the Act's protections. The Commission takes the only permissible position: that discrimination on the basis of alienage *always* has the effect of discrimination on the basis of national origin. Refusing to hire an individual because he is an alien "is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII." Brief

for Commission as *Amicus Curiae* 5. The Commission's interpretation of the statute is entitled to great weight.

There is no legislative history to cast doubt on this construction.[3] Indeed, any other construction flies in the face of the underlying congressional policy of removing "artificial, arbitrary, and unnecessary barriers to employment." *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 806 (1973).

Mrs. Espinoza is a permanent resident alien, married to an American citizen, and her children will be native-born American citizens. But that first generation has the greatest adjustments to make to their new country. Their unfamiliarity with America makes them the most vulnerable to exploitation and discriminatory treatment. They, of course, have the same obligation as American citizens to pay taxes, and they are subject to the draft on the same basis. But they have never received equal treatment in the job market. Writing of the immigrants of the late 1800's, Oscar Handlin has said:

> "For want of alternative, the immigrants took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweat-

[3] The only legislative history the majority points to is Congressman Roosevelt's definition of "national origin": "It means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country." *Ante,* at 89. But that only makes clear what petitioners here argue—that Mrs. Espinoza cannot be discriminated against because she comes from a foreign country. The majority's mention of the deletion of the word "ancestry," *ibid.,* is certainly irrelevant. Obviously "national origin" comprehends "ancestry," but as Congressman Roosevelt pointed out it means more—not only where one's forebears were born, but where one himself was born.

> shops and the homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all." The Newcomers 24 (1959).

The majority decides today that in passing sweeping legislation guaranteeing equal job opportunities, the Congress intended to help only the immigrant's children, excluding those "for whom there [is] no place at all." I cannot impute that niggardly an intent to Congress.

PASCHALL ET AL. *v.* CHRISTIE-STEWART, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

No. 72-922. Argued October 16, 1973—Decided November 19, 1973

Where it appears that the running of the limitations period might have been the trial court's independent ground for denying appellants' mineral rights claim, so that any decision of this Court on whether the tax-sale notice provisions of state law met federal due process requirements would be advisory and beyond the Court's jurisdiction, the court below should consider whether appellants preserved the right to challenge the trial court's determination that the statute of limitations bars their claim, and whether under state law it does so irrespective of the constitutional adequacy of the tax-sale notice provisions.

502 P. 2d 1265, vacated and remanded.

William J. Legg argued the cause and filed briefs for appellants.

Joe S. Rolston III argued the cause and filed a brief for appellees.

PER CURIAM.

In this case we noted probable jurisdiction, 411 U. S. 915 (1973), in order to consider whether the published notice provisions of the then-applicable Oklahoma tax-sale statutes, Okla. Stat., Tit. 68, §§ 382 and 432b (1951), comported with due process of law guaranteed by the Fourteenth Amendment.[1] See *Mullane* v. *Central Han-*

[1] The ad valorem taxes in question were for the year 1952. The original tax sale took place in November 1953 and the resale in May 1956. Okla. Stat., Tit. 68, §§ 383 and 432 (1951). The statutes cited (§§ 382, 383, 432, and 432b) were repealed by Okla. Sess. Laws 1965, c. 501, § 3, and replaced by corresponding provisions of the State's present Ad Valorem Tax Code, namely, Okla. Stat. Ann., Tit. 68, §§ 24312, 24313, 24329, and 24331 (1966).

over Bank & Trust Co., 339 U. S. 306 (1950). This was the only issue addressed by the appellate courts of Oklahoma [2] and by the parties in the Jurisdictional Statement and the papers responsive thereto filed with this Court.

After oral argument and upon our review of the record, it now appears that there might have been an independent and, possibly, an unchallenged ground for the judgment of the state trial court, *viz.*, the running of the Oklahoma period of limitation for adverse claims.[3] If

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[2] See 502 P. 2d 1265 (1972). The earlier opinion of the Oklahoma Court of Appeals, Division 2, is not reported; it is reproduced in the Jurisdictional Statement, App. A, p. vii.

[3] The trial court's judgment read in part as follows:

"(2) The Court Further Finds, Orders, Adjudges and Decrees that from the date of the recording of said resale tax deed, on June 6, 1956 . . . said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in the open, continuous, visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants, are further forever barred and precluded by the statute of limitations, from seeking to assert the invalidity of said resale tax deed, as provided by 12 O. S. 1961, Sec. 93 (3) and (6)." Jurisdictional Statement, App. B, p. xvii.

Okla. Stat. Ann., Tit. 12, § 93 (Supp. 1973–1974), reads:

§ 93. Limitation of real actions.—"Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter:

. . . . . .

"(3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the tax deed . . . provided, nothing herein shall be construed as reviving any cause of action for recovery of real property heretofore barred nor as divesting any interest acquired by adverse possession prior to the effective date hereof.

. . . . . .

"(6) Numbered paragraphs 1, 2, and 3 shall be fully operative regardless of whether the deed or judgment or the precedent action

that should prove to be the case, any decision by this Court would be advisory and beyond our jurisdiction. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636 (1875).

The judgment of the Supreme Court of Oklahoma is therefore vacated and the case is remanded to that court to consider whether the appellants preserved the right to challenge the trial court's determination that the State's statute of limitations is a bar to their mineral rights claim, and, if so, whether, under state law, the statute of limitations independently bars appellants' claim, irrespective of the constitutional adequacy of the tax-sale notice provisions of §§ 382 and 432b.[4] Cf. *Walker* v. *Hoffman*, 405 P. 2d 57 (Okla. 1965).

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

Appellants claim title to the mineral interests here in controversy through deeds recording the severed interests on the books of the Seminole County Clerk in 1926 and 1930. In 1952 the owner of the separate surface interest failed to pay ad valorem taxes and the county satisfied its tax claim by selling the entire fee to the appellees after "notice" through newspaper publication. The tax-sale statutes did not require that notice be given to the mineral owners by way of personal service, mailing, or

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or proceeding upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date."

[4] Whether the alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma courts below. Cf. *Shroeder* v. *City of New York*, 371 U. S. 208, 213–214 (1962). We intimate no view on this issue.

posting, and no such notice was attempted. In an action to quiet title appellants contended that, as record owners of the mineral rights, they were never given constitutionally sufficient notice of the tax delinquency proceedings and as to them the proceedings were invalid. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

The trial court, finding the tax-sale proceedings valid and finding appellants' attack on the tax-sale deed barred by the statute of limitations, quieted title in appellees. The Oklahoma Court of Appeals reversed that judgment but was itself reversed by the Oklahoma Supreme Court, each court addressing itself expressly only to the constitutional claim. The Court today remands the case to determine whether appellants adequately preserved the right to challenge the adverse trial court ruling on the statute of limitations issue and whether this may serve as an independent bar to the assertion of their claim.

It should first be noted that proper preservation of this issue in the state courts is a hurdle facing not the appellants but the appellees. The Oklahoma Court of Appeals quieted title in appellants and thus must necessarily have found, not only that the tax sale was constitutionally infirm, but also that the appellants' claim was not time barred. The Oklahoma Supreme Court reversed that judgment and affirmed the judgment of the trial court after finding that "[*t*]*he* question for decision is whether the Oklahoma statutory procedure . . . complies with . . . due process of law." 502 P. 2d 1265, 1266 (1972) (emphasis added). Whether appellees adequately raised the statute of limitations ground in objecting to the Court of Appeals judgment, we do not know. What we do know is that the Oklahoma Supreme Court quieted title in appellees by rejecting appellants' constitutional claim. Either because the issue was not

properly before the court or because decision on it was not necessary, the statute of limitations issue was not reached.

What faces this Court is thus a decision quieting title in appellees by rejecting appellants' federal constitutional claim. As the majority notes, this was the only issue addressed by the parties in the Jurisdictional Statement and the responsive papers filed with this Court. When a constitutional adjudication is not the only basis on which a state court judgment rests, a review of that adjudication by this Court would be advisory since the judgment would rest on its independent grounds regardless of the outcome of our review. But the only issue before us in this case is a constitutional one since the only basis for the reversal below is the rejection of appellants' constitutional claim. When a decision rests only on a constitutional determination, a review of that determination is dispositive of the correctness of the decision and is thus not advisory. I would therefore face the constitutional claim at this point.

HESS *v.* INDIANA

APPEAL FROM THE SUPREME COURT OF INDIANA

No. 73–5290. Decided November 19, 1973

Appellant, who was arrested during an antiwar demonstration on a college campus for loudly stating, "We'll take the fucking street later (or again)," was subsequently convicted for violating the Indiana disorderly conduct statute. The State Supreme Court affirmed, relying primarily on the trial court's finding that the statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." *Held:* Appellant's language did not fall within any of the "narrowly limited classes of speech" that the States may punish without violating the First and Fourteenth Amendments, and since the evidence showed that the words he used were not directed to any person or group and there was no evidence that they were intended and likely to produce *imminent* disorder, application of the statute to appellant violated his rights of free speech. *Brandenburg* v. *Ohio*, 395 U. S. 444. See also *Terminiello* v. *Chicago*, 337 U. S. 1, 4.

— Ind. —, 297 N. E. 2d 413, reversed.

PER CURIAM.

Gregory Hess appeals from his conviction in the Indiana courts for violating the State's disorderly conduct statute.[1] Appellant contends that his conviction should be reversed because the statute is unconstitutionally vague, *Connally* v. *General Construction Co.*, 269 U. S.

[1] "Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars [$500] to which may be added imprisonment for not to exceed one hundred eighty [180] days." Ind. Code 35–27–2–1 (1971), Ind. Ann. Stat. § 10–1510 (Supp. 1972).

385 (1926), because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments, *Gooding* v. *Wilson*, 405 U. S. 518 (1972), and because the statute, as applied here, abridged his constitutionally protected freedom of speech, *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). These contentions were rejected in the City Court, where Hess was convicted, and in the Superior Court, which reviewed his conviction.[2] The Supreme Court of Indiana, with one dissent, considered and rejected each of Hess' constitutional contentions, and accordingly affirmed his conviction.

The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him.

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[2] The State contends that Hess failed to preserve his constitutional contentions in the state courts. But the record demonstrates that Hess moved to quash the affidavit for disorderly conduct in the City Court on the constitutional grounds that he is asserting in this Court. The State points out that, on appeal to the Superior Court, appellant received a trial *de novo* and did not again move to quash the affidavit in that court. But the refusal of the City Court to quash the affidavit was asserted as error by Hess on his appeal to the Superior Court, and his memorandum in support of his appeal pressed the constitutional contentions. Since the Supreme Court of Indiana considered and resolved each of Hess' constitutional contentions, it is apparent that it regarded Hess' actions in the state courts as sufficient under state law to preserve his constitutional arguments on appeal.

The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction, that they heard Hess' words and witnessed his arrest. They indicated that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.

Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that "[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" *Gooding* v. *Wilson, supra,* at 521–522. The words here did not fall within any of these "limited classes." In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene under *Roth* v. *United States,* 354 U. S. 476 (1957), and its progeny. Indeed, after *Cohen* v. *California,* 403 U. S. 15 (1971), such a contention with regard to the language at issue would not be tenable. By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), could not withstand scrutiny. Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular. Although the sheriff testified that he was offended by the language,

he also stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309 (1940); *Cohen* v. *California, supra*, at 20.

In addition, there was no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded. "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California, supra*, at 21. The prosecution made no such showing in this case.

The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." — Ind. —, —, 297 N. E. 2d 413, 415 (1973). At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). (Emphasis added.) See also *Terminiello* v. *Chicago*, 337 U. S., at 4. Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it

cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'" — Ind., at —, 297 N. E. 2d, at 415.

Accordingly, the motion to proceed *in forma pauperis* is granted and the judgment of the Supreme Court of Indiana is reversed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The Court's *per curiam* opinion rendered today aptly demonstrates the difficulties inherent in substituting a different complex of factual inferences for the inferences reached by the courts below. Since it is not clear to me that the Court has a sufficient basis for its action, I dissent.

It should be noted at the outset that the case was tried *de novo* in the Superior Court of Indiana upon a stipulated set of facts, and, therefore, the record is perhaps unusually colorless and devoid of life. Nevertheless, certain facts are clearly established. Appellant was arrested during the course of an antiwar demonstration conducted at Indiana University in May 1970. The demonstration was of sufficient size and vigor to require the summoning of police, and both the Sheriff's Department and the Bloomington Police Department were asked to help university officials and police remove demonstrators blocking doorways to a campus building. At the time the sheriff arrived, "approximately 200–300 persons" were assembled at that particular building.

The doorways eventually were cleared of demonstrators, but, in the process, two students were placed under arrest.

This action did not go unnoticed by the demonstrators. As the stipulation notes, "[i]n apparent response to these arrests, about 100–150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed." Thus, by contrast to the majority's somewhat antiseptic description of this massing as being "[i]n the course of the demonstration," the demonstrators' presence in the street was not part of the normal "course of the demonstration" but could reasonably be construed as an attempt to intimidate and impede the arresting officers. Furthermore, as the stipulation also notes, the demonstrators "did not respond to verbal directions" from the sheriff to clear the street. Thus, the sheriff and his deputies found it necessary to disperse demonstrators by walking up the street directly into their path. Only at that point did the demonstrators move to the curbs.

The stipulation contains only one other declaration of fact: that Sheriff Thrasher arrested the appellant, Gregory Hess, for disorderly conduct. The remainder of the stipulation merely summarizes testimony, particularly the testimony of Sheriff Thrasher, two female witnesses (both students at Indiana University) who were apparently part of the crowd, and Dr. Owen Thomas, a professor of English at the university. The only "established" facts which emerge from these summaries are that "Hess was standing off the street on the eastern curb of Indiana Avenue" and that he said, in the words of the trial court, "We'll take the fucking street later (or again)." The two female witnesses testified, as the majority correctly observes, that they were not offended by Hess' statement, that it was said no louder than statements by other demonstrators, "that Hess *did not appear* to be exhorting the crowd to go back into the street," that he was facing the crowd, and "that his state-

ment *did not appear* to be addressed to any particular person or group." (Emphasis added.)

The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd. The opinions of two defense witnesses cannot be considered *proof* to the contrary, since the trial court was perfectly free to reject this testimony if it so desired. Perhaps, as these witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, but that is surely not the only rational explanation.

The majority also places great emphasis on appellant's use of the word "later," even suggesting at one point that the statement "could be taken as counsel for present moderation." The opinion continues: "[A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." From that observation, the majority somehow concludes that the advocacy was not directed towards inciting imminent action. But whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police. They should not be rejected out of hand because of an unexplained preference for other acceptable alternatives.

The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below. In doing so, however, I believe the Court has exceeded the proper scope of our review. Rather than considering the "evidence" in the light most

favorable to the appellee and resolving credibility questions against the appellant, as many of our cases have required,* the Court has instead fashioned its own version of events from a paper record, some "uncontroverted evidence," and a large measure of conjecture. Since this is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court, I dissent.

*See, *e. g.*, *Glasser* v. *United States*, 315 U. S. 60, 80 (1942).

Per Curiam

CHICAGO MERCANTILE EXCHANGE *v.* DEAKTOR ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73-241. Decided December 3, 1973

Two suits were brought charging petitioner, the Chicago Mercantile Exchange, with, *inter alia,* violating the Commodity Exchange Act (CEA) and failure to enforce its own rules. The District Court refused petitioner's applications for stays of the suits to permit the Commodities Exchange Commission to determine initially whether the challenged actions comported with the CEA and petitioner's rules. The Court of Appeals affirmed. *Held:* The Commission, whose administrative functions appear to encompass adjudication of the charges against petitioner, should pass on those charges in the first instance. *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289.

Certiorari granted; 479 F. 2d 529, reversed and remanded.

PER CURIAM.

The petitioner, Chicago Mercantile Exchange, was sued in two separate actions in the District Court. In one, the *Phillips* suit, it was alleged that the Exchange had forced sales of futures contracts in March 1970 fresh eggs at artificially depressed market prices and had thereby monopolized and restrained commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, and had violated § 9 (b) of the Commodity Exchange Act (CEA), as amended, 82 Stat. 33, 7 U. S. C. § 13 (b), by manipulating prices of a commodity for future delivery on a contract market. The Exchange was also accused of violating § 5a of the CEA, 7 U. S. C. § 7a (8), for failure to enforce one of its own rules. In the second suit, the *Deaktor* case, the Exchange was charged with violating the CEA and its own rules as a designated contract market because it had failed

to exercise due care to halt the manipulative conduct of certain of its members who allegedly had cornered the July 1970 market in frozen pork bellies futures contracts.

The Exchange defended both actions on the ground that it was faithfully discharging its statutory duty of self-regulation. It asserted that its challenged acts in the *Phillips* case were measures taken to prevent speculation in futures contracts and as such were not in violation of the CEA. Rather, they were authorized and required by the statute and hence cannot be considered within the reach of the antitrust laws. Likewise, in the *Deaktor* suit, the Exchange claimed that it had taken all proper and reasonable steps to perform its statutory responsibility to prevent manipulation.

The Exchange further urged that because the Commodity Exchange Commission had jurisdiction to determine whether the Exchange was violating the CEA or its own rules and to impose sanctions for any such offense, both suits should be stayed to permit the Commission to determine in the first instance whether or not the actions of the Exchange under scrutiny were in discharge of its proper duties under the CEA and its regulations. The District Court refused the stay, and the Court of Appeals affirmed. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F. 2d 529 (CA7 1973). Both courts were in error.

Ricci v. *Chicago Mercantile Exchange*, 409 U. S. 289 (1973), held that an antitrust action against the Exchange should have been stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the Exchange was in compliance with the statute and with Exchange rules. Because administrative adjudication of alleged violations of the CEA and the rules lay at the heart of the task assigned the Commission by Congress, we recognized that

the court, although retaining final authority to interpret the CEA and its relationship to the antitrust laws, should avail itself of the abilities of the Commission to unravel the intricate and technical facts of the commodity industry and to arrive at some judgment as to whether the Exchange had conducted itself in compliance with the law. An adjudication by the Commission that the actions of the Exchange were authorized or required by the CEA would not necessarily dispose of the question of immunity from antitrust liability. We nevertheless thought the considered view of the Commission would be of sufficient aid to the court that the action should not go forward without making reasonable efforts to invoke the jurisdiction of the Commission. *Id.*, at 305–306. As we did in *Ricci*,

> "we simply recognize that Congress has established a specialized agency that would determine either that a . . . rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regime . . . ." *Id.*, at 307.

In our judgment, the Court of Appeals, as in *Ricci*, should have requested the District Court to stay the proceedings in the *Phillips* case to afford an opportunity to invoke the jurisdiction of the Commission. For very similar reasons, the *Deaktor* plaintiffs, who also alleged violations of the CEA and the rules of the Exchange, should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case.

The petition for writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART dissents. He would affirm the judgment substantially upon the reasoning of Judge Castle's concurring opinion in the Court of Appeals. 479 F. 2d 529, 535.

Syllabus

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* WARE

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 72–312. Argued October 9–10, 1973—Decided December 4, 1973

When respondent voluntarily terminated his employment as an account executive in petitioner securities broker's San Francisco office for a similar position with a competitor, petitioner determined, pursuant to a forfeiture clause of its employees' profit-sharing plan, that respondent, by entering competitive employment, had forfeited all rights to the plan's benefits. Respondent sought a declaratory judgment in a California state court that the forfeiture clause was unlawful under § 16600 of the California Business and Professions Code, which invalidates every contract restraining a person from engaging in a lawful business. Petitioner answered, *inter alia,* that a condition of respondent's employment with petitioner was approval by the New York Stock Exchange; that respondent, at the time of his employment, applied on an Exchange form for such approval, as required by Exchange Rule 345 (a) (1), pledging to abide by Exchange rules; and as required by Rule 347 (b) agreed to submit to arbitration any controversy arising out of termination of his employment. On petitioner's appeal from the denial of its petition for an order directing arbitration, the California Court of Appeal held that a written agreement to arbitrate did exist, but that the forfeiture clause of the profit-sharing plan was invalid as in restraint of trade under California law when applied to California residents, and petitioner's contributions under the plan were wages under provisions of the California Labor Code giving wage earners a right of action for wages due and unpaid despite any private agreement to arbitrate. *Held:* Exchange Rules 345 (a) (1) and 347 (b), promulgated as self-regulatory measures pursuant to § 6 of the Securities Exchange Act of 1934 (the Act), and respondent's pledge to abide by those rules, do not pre-empt the avenues of wage relief otherwise available to respondent under California law. Pp. 125–140.

(a) Rule 347 (b) does not fall under the Exchange's mandate to protect the investing public and to insure just and equitable trade practices set forth in §§ 6 (d) and 19 (b) of the Act, so as

to require pre-emption of contrary state law by such rule, there being nothing in the Act or any SEC rule or regulation specifying arbitration as a favored means of resolving employer-employee disputes, and it being clear that Rule 347 (b) would not be subject to the SEC's modification or review under § 19 (b). Pp. 134–136.

(b) Rule 347 (b) cannot be categorized as part of a need for uniform national regulation, there being no revelation in the Act or in any SEC regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary, and it not being shown that national uniformity in the area of wage claims is vital to federal securities policy. Pp. 136–137.

(c) The "applicable state laws" referred to in § 6 (c) of the Act, which subjects exchange rules to a requirement of consistency with the Act, "and the applicable laws of the State in which it is located," are not in this instance, merely because the New York Stock Exchange is in New York City, the laws of New York so as to require the California court to apply New York law compelling arbitration of this dispute and validating the forfeiture clause of the profit-sharing plan, since § 6 (c) has no independent existence creating some sort of spurious uniformity of application for all States, but merely requires that any exchange rule adopted outside the Act's context comport with the laws of the State in which the exchange is located. Pp. 137–139.

(d) Where California has manifested a strong statutory policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship, that policy should prevail absent any interference with the federal regulatory scheme; in this case there is not only no such interference, but the Act's structure manifests a congressional intent that state policies in this area should operate vigorously. Pp. 139–140.

(e) Even though petitioner's profit-sharing plan is open to all eligible employees in the United States, and respondent's employment and petitioner's business are interstate, the application of the California law would not unduly burden interstate commerce. P. 140.

24 Cal. App. 3d 35, 100 Cal. Rptr. 791, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined, except STEWART, J., who took no part in the decision of the case.

William H. Orrick, Jr., argued the cause for petitioner. With him on the briefs was *W. Reece Bader.*

Joseph C. Barton argued the cause for respondent. With him on the brief was *Thomas E. Feeney.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether certain rules of the New York Stock Exchange, promulgated as self-regulating measures pursuant to § 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f, and a broker's employee's pledge to abide by those rules, pre-empt avenues of wage relief otherwise available to the employee under state law. The California Court of Appeal answered this in the negative. 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (1972). Because of the significance of the question in the area of federal-state relations, we granted certiorari. 410 U. S. 908 (1973).

I

Respondent, David Ware, in July 1958 entered the employ of petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc., a New York corporation, as a registered representative or "account executive" in the petitioner's San Francisco office. Ware worked there continuously until March 1969 when he voluntarily terminated that relationship and accepted a similar position in San Francisco with one of Merrill Lynch's competitors.

Merrill Lynch is a broker-dealer in securities and is a member-corporation of the New York Stock Exchange. Since prior to 1958, the firm has had a noncontributory Profit-Sharing Plan for its employees in the United States.

**Solicitor General Bork, Gerald P. Norton, David Ferber,* and *Richard E. Nathan* filed a brief for the United States as *amicus curiae* urging affirmance.

Under the Plan an employee may have allocated to his account both vested and unvested units, as therein described. Article 11 of the Plan relates to "Forfeiture of Benefits" upon the happening of specified events. One such event is competitive activity:

> "11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

The Committee referred to is provided for by the Plan's Art. 1. It has not less than five nor more than nine persons (not necessarily employees) appointed by Merrill Lynch and serving "at the pleasure of the Corporation." Article 1.2 states that the Committee "shall administer the Plan" and "shall determine any questions arising in the administration, interpretation and application of the Plan, which determination shall be conclusive and binding on all persons."

At the time Ware terminated his employment with Merrill Lynch in March 1969, both vested and unvested units were allocated to his account. Upon his departure, the Committee, pursuant to Art. 11.1, determined that Ware, by entering competitive employment, had forfeited all rights to benefits due or to become due him under the Plan.

In January 1970 Ware filed this class action in California state court against Merrill Lynch and the members of the Committee. The class purported to consist of Ware and all other similarly situated former

Merrill Lynch employees in California. Declaratory relief was sought to the effect that Art. 11.1 was "unlawful and void under applicable California law," and that the defendants were obligated to pay all vested units credited from December 30, 1960, to the date of termination of employment.

Although the statute was not cited in the complaint, the parties appear to agree that the suit rested principally on § 16600 of the California Business and Professions Code. This reads:

> "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

In its answer, Merrill Lynch alleged that the provisions of Art. 11.1 were a reasonable restraint on competition under the laws of New York or of the United States; that, pursuant to Art. 22.1[1] of the Plan, it was to be construed according to the laws of New York; that under New York law Art. 11.1 is lawful, valid, and enforceable; that a condition of Ware's employment with Merrill Lynch was approval by the New York Stock Exchange; that Ware, at the time of his employment in 1958, executed a written application, on an Exchange form, for approval of his employment as a registered representative, as required by the Exchange's Rule 345 (a)(1);[2] that by ¶ 30 (j) of that form Ware agreed that any controversy with a member arising out of the

[1] "22.1 The validity of the Plan or of any of the provisions thereof shall be determined under and shall be construed according to the laws of the State of New York."

[2] "Rule 345. (a) No member or member organization shall

"(1) permit any person to perform regularly the duties customarily performed by a registered representative, unless such person shall have been registered with and is acceptable to the Exchange . . . ."

termination of his employment would be settled by arbitration at the instance of any party; [3] that the Exchange approved the application; that Ware's sole remedy was arbitration; and that a declaration that Art. 11.1 was invalid under the laws of California would cause Merrill Lynch to discriminate in the administration of the Plan and would deprive it of due process of law.

Merrill Lynch, invoking § 1281.2 of the California Code of Civil Procedure,[4] petitioned the state court for an

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[3] Paragraph 30 (j) of the Exchange form reads:

"(j) I agree that any controversy between me and any . . . member organization arising out of my employment or the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the New York Stock Exchange."

Paragraph 30 (d) of the same form reads in part:

"(d) I have read the Constitution and Rules of the Board of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange as the same have been or shall be from time to time amended, and by all rules and regulations adopted pursuant to the Constitution, and by all practices of the Exchange."

Rule 347 (b) of the New York Stock Exchange, adopted in April 1958, prior to Ware's employment, provides:

"(b) Any controversy between a registered representative and any . . . member organization arising out of the employment or termination of employment of such registered representative by and with such . . . member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules."

It is thus apparent that ¶ 30 (j) of the form follows the language of the Exchange's Rule 347 (b).

[4] "§ 1281.2 Order to arbitrate controversy; petition; determination of court

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall

order directing arbitration pursuant to the above-quoted ¶ 30 (j) and Ware's pledge, contained in his application for approval of employment, that he would "abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange" and that he submitted himself "to the jurisdiction of such Exchange."

Ware opposed arbitration on the grounds that no contract to arbitrate existed between him and Merrill Lynch; that if an agreement to this effect existed, it was a contract of adhesion; and that, since § 16600 made the forfeiture provision illegal under California law, it was not arbitrable.

The state trial court, by minute order, denied the petition to compel arbitration.

Merrill Lynch then appealed. The California Court of Appeal held that a written agreement to arbitrate did exist; that the Exchange form was "a contractual agreement"; and that the "approval and registration by Merrill Lynch made the application a contract between the parties." 24 Cal. App. 3d, at 40–41, 100 Cal. Rptr., at 795–796. The court went on to hold, however, that the forfeiture clause was invalid and unenforceable under California law, when applied to California residents, as being in restraint of trade. *Id.*, at 42–43, 100 Cal. Rptr., at 796–797. Cited as supporting authorities were *Frame* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971), where the same forfeiture clause was held ineffective under California law, but where the court also held that an

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order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"(a) The right to compel arbitration has been waived by the petitioner; or

"(b) Grounds exist for the revocation of the agreement. . . ."

enforceable agreement to arbitrate existed,[5] and *Muggill* v. *Reuben H. Donnelley Corp.*, 62 Cal. 2d 239, 398 P. 2d 147 (1965).

Finally, the Court of Appeal, while taking note of California's "strong public policy" favoring arbitration, held that Merrill Lynch's contributions under its Profit-Sharing Plan were wages, within the meaning of §§ 200 [6]

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[5] In *Frame*, decided only five months earlier, the same California Court of Appeal *reversed* a trial court's order *denying* arbitration and thus seemingly arrived at an ultimate result opposite to that reached in the present case. The court held, 20 Cal. App. 3d 668, 671–673, 97 Cal. Rptr. 811, 813–815, that Frame (like Ware) had made an agreement to arbitrate; that there was no basis for using the doctrine of adhesion to avoid arbitration; that the forfeiture provision of Art. 11.1 was ineffective under § 16600; that the agreement's provision that New York law was to apply "must not be allowed to defeat" the policy of § 16600; that, however, the entire contract was not necessarily unlawful; and that a

"latent question exists as to whether the agreements of the parties may be construed as applying only to such permissible subjects of restraint as breaches of confidence and misappropriation of trade secrets. Other questions may be raised as to the time and circumstances of respondent's employment and the amount of any benefits earned and remaining unpaid. All of these matters, whether they involve questions of law or questions of fact are in the first instance properly subject to arbitration." 20 Cal. App. 3d, at 673, 97 Cal. Rptr., at 815.

But no mention was made in *Frame* of §§ 200 and 229 of the State's Labor Code, see nn. 6–7, *infra*, and, as the court later said in this case, 24 Cal. App. 3d 35, 43, 100 Cal. Rptr. 791, 797, "[t]he *Frame* court did not consider the effect of section 229 of the Labor Code on the arbitration agreement." Apparently, neither side in *Frame* sought review by the California Supreme Court.

[6] "§ 200. Definitions

"As used in this article: (a) 'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

and 229[7] of the California Labor Code, and that § 229 gave Ware "the right to bring his claim in court in spite of any agreement to arbitrate." 24 Cal. App. 3d, at 43–44, 100 Cal. Rptr., at 797–798. Merrill Lynch's petition for hearing by the Supreme Court of California was denied without opinion. See 24 Cal. App. 3d, at 45.

II

The broad issue thus presented to us is the extent to which authority delegated under a federal regulatory statute pre-empts state law. Specifically, we are concerned with the questions (a) whether, in the context of the present case, § 229 of the California Labor Code, which would preclude compulsory arbitration of wage disputes, is ineffective under the Supremacy Clause; (b) whether § 16600 of the California Business and Professions Code unduly interferes with federal regulation of the securities industry; and (c) whether the California legislation unconstitutionally burdens interstate commerce.

In order to resolve these questions, we think it necessary to review the principles of stock exchange preemption delineated in this Court's decision a decade ago in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), and to examine the geneses of the federal Act and of the California statute.

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[7] "§ 229. Actions to enforce payment of wages; effect of arbitration agreements

"Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

Section 229 was added to the Code in 1959. Cal. Stats. 1959, c. 1939, p. 4532.

A. In *Silver* the Court considered whether, and to what extent, the federal antitrust laws apply to securities exchanges regulated by the 1934 Act. It held that the mere passage of the Act did not effect, *pro tanto*, a repeal of the federal antitrust laws, but that particular instances of exchange regulation that fall within the scope and purposes of the Act may be justified and will be upheld against antitrust challenge. *Id.*, at 357–361. With respect to the specific question there presented, it was clear that the New York Stock Exchange had exercised its "tremendous economic power," *id.*, at 361, against two nonmembers by discontinuing their direct-wire telephone connections with members of the Exchange without notice, hearing, or statement of reasons. It was the Court's view, under the circumstances, that procedural guarantees were necessary in order to protect against the possibility of proscribed antitrust practices and to provide the "extremely beneficial effect in keeping exchange action from straying into areas wholly foreign to the purposes of the Securities Exchange Act." *Id.*, at 362. See also, *Ricci* v. *Chicago Mercantile Exchange*, 409 U. S. 289, 300–301 (1973).

In contrast with *Silver*, we are not confronted here with conflicting federal regulatory schemes. The present controversy concerns the interrelationship between statutes adopted, respectively, by the Federal Government and a State. The analytical framework of *Silver* is instructive, nonetheless. There the Court reviewed carefully the securities exchange regulatory scheme that Congress had adopted in order to identify the character and purposes of the Act and the extent to which instances of exchange self-regulation were necessary to the furtherance of congressional aims and objectives. 373 U. S., at 349–361. It was mindful, also, of the purposes behind the conflicting statutes which, in that case, were the

antitrust laws. So here, we may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.*, at 357.[8] The principle that emerged from *Silver*, and the premise upon which the Court based its judgment, was that conflicting law, absent repealing or exclusivity provisions, should be pre-empted by exchange self-regulation "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." *Id.*, at 361.

B. The Securities Exchange Act of 1934, as amended, 15 U. S. C. §§ 78a to 78hh–1, "regulates securities markets and the business of securities brokers and dealers." Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, pt. 1, 88th Cong., 1st Sess., 3 (1963). Two types of regulation are reflected in the Act. Some provisions impose direct requirements and prohibitions. Among these are mandatory exchange registration, restrictions on broker and dealer borrowing, and the prohibition of manipulative or deceptive practices. Other provisions are flexible and rely on the technique of self-regulation to achieve their objectives. *Ibid.* Supervised self-regulation, although consonant with the traditional private governance of exchanges, allows the Government to

[8] This approach is supported by decisions extending back to the turn of the century. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440 (1960); *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617 (1958); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944); *Savage* v. *Jones*, 225 U. S. 501 (1912).

monitor exchange business in the public interest.[9] MR. JUSTICE DOUGLAS, when he was Chairman of the Securities and Exchange Commission, observed that this permits the exchanges to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." W. Douglas, Democracy and Finance 82 (J. Allen ed. 1940).

The Act provides for stock exchanges to be registered by the Commission. § 6, 15 U. S. C. § 78f. It outlaws securities transactions conducted on unregistered exchanges. § 5, 15 U. S. C. § 78e. It conditions registration on a showing that the exchange has rules that are "just and adequate to insure fair dealing and to protect investors." § 6 (d), 15 U. S. C. § 78f (d). An exchange seeking registration must also meet other requirements. It must agree "to enforce so far as is within its powers compliance by its members" with the

[9] The first attempt at exchange regulation arose after the panic of 1907 when, in response to public concern over speculation, President Theodore Roosevelt urged Congress to take action. 42 Cong. Rec. 1347, 1349 (1908). Nothing of significance happened, however, until after the 1929 stock market crash. It became apparent that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto." Securities Exchange Act of 1934, § 2, 15 U. S. C. § 78b. Self-regulation was adopted as a means of policing the exchanges. The tradition, as has been noted, had been one of self-governance; the financial community was strongly opposed to governmental control of daily exchange business; and the task was deemed to be of such magnitude that Government simply could not regulate effectively every aspect of the industry. Comment, 48 Minn. L. Rev. 597–598 (1964); 2 L. Loss, Securities Regulation 1175–1176 (1961), and 5 *id.*, at 3138–3139 (1969).

Act and the Commission's rules and regulations thereunder. § 6 (a)(1), 15 U. S. C. § 78f (a)(1). It must include in its rules a provision for the disciplining of a member "for conduct or proceeding inconsistent with just and equitable principles of trade." § 6 (b), 15 U. S. C. § 78f (b). And it must supply to the Commission copies of its constitution, articles of incorporation, and bylaws, and such data or other information as the Commission may require "as being necessary or appropriate in the public interest or for the protection of investors." § 6 (a)(3) and (2), 15 U. S. C. § 78f (a) (3) and (2).

The Commission's direct authority with respect to exchange self-regulation is supervisory. Apart from its responsibilities in registering exchanges, the Commission may "alter or supplement" the rules of an exchange if such action is "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." § 19 (b), 15 U. S. C. § 78s (b).[10] This authority, however, relates to 12 designated subject areas and "similar matters." *Ibid.* As a consequence, some exchange rules are not subject to direct Commission scrutiny, *In re Rules of the New York Stock Exchange,* 10 S. E. C. 270, 294 (1941), and, instead, if they do not operate contrary to the interests of insuring fair dealing and protecting investors, would kindle no federal curiosity and would serve no identifiable public purpose. It is to be noted, moreover, that the Commission has exercised its direct supervisory power

[10] The Commission also has broad rulemaking power under the Act. See, for example, §§ 8, 9, and 11, 15 U. S. C. §§ 78h, 78i, and 78k. No question is presented in this case as to the authority of the Commission to promulgate rules affecting the operation of stock exchanges.

sparingly. Securities Industry Study, Report of the Subcommittee on Securities, Committee on Banking, Housing and Urban Affairs, S. Doc. No. 93–13, p. 180 (1973).

Apart from registration and direct Commission supervision, the only other qualification on exchange autonomy is the statutory requirement that any rules promulgated and enforced by an exchange not be "inconsistent with this [Act] and the rules and regulations thereunder and the applicable laws of the State in which it is located." § 6 (c), 15 U. S. C. § 78f (c).

From this review of relevant portions of the Act, it is apparent that Congress accorded maximum scope to self-regulation, and reposed powers in the Commission "to be exercised as needed but in such manner as to allow maximum initiative and responsibility to the self-regulators." Report of the Special Study, *supra*, pt. 4, p. 726. In the words of the Senate Report issued at the time of enactment,

> "Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. Rep. No. 792, 73d Cong., 2d Sess., 13 (1934).

It is thus clear that the congressional aim in supervised self-regulation is to insure fair dealing and to protect investors from harmful or unfair trading practices. To the extent that any exchange rule or practice contravenes this policy, or any authorized rule or regulation under the Act, the rule may be subject to appropriate federal regulatory supervision or action. Correspondingly, any rule or practice not germane to fair dealing

or investor protection would not appear to fall under the shadow of the federal umbrella; it is, instead, subject to applicable state law.

C. On the other side are the California statutes. By the addition of § 229 to its Labor Code in 1959 California codified for the wage earner, with the solitary collective-bargaining-agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate. Selected 1959 Code Legislation, 34 Cal. St. B. J. 581, 706–707. This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance. The statute's legislative history is sparse, but the exception carved out for collective-bargaining disputes provides the obvious conclusion that it was the individual, nonunion, and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy. This conclusion is fortified by the fact that § 200 (a) of the Code defines "wages" broadly to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." And the California court itself has noted "the established policy . . . of protecting and promoting" the right, " 'favored' in the law," of the wage earner "to all wages lawfully accrued to him." *City of Ukiah* v. *Fones*, 64 Cal. 2d 104, 108, 410 P. 2d 369, 371 (1966). It may be, too, that the legislature felt that arbitration was a less than adequate protection against awarding the wage earner something short of what was due compensation. In any event, there is the harder substance of California case law. In *Local 659* v. *Color Corp. of America*, 47 Cal. 2d 189, 302 P. 2d

294 (1956), decided prior to the addition of § 229 to the Labor Code, the court held that the then § 1280 of the State's Code of Civil Procedure, providing for the enforcement of an arbitration clause in a contract and characterizing it as "irrevocable," was subject to waiver or mutual rescission. The statute provided that arbitration was required "save upon such grounds as exist at law or in equity for the revocation of any contract." [11] California, thus, does not exclude a remedy available at law or in equity for the revocation of any contract that happens to contain an arbitration clause.

This conclusion as to the broad and liberal intendment of § 229 is reinforced by the Court of Appeal's observation in the present case, 24 Cal. App. 3d, at 44–45, 100 Cal. Rptr., at 798, that the State's Arbitration Act, revised in 1961, embraced no attempt to change the right of action first accorded the wage earner only two years earlier in 1959. The record is clear, moreover, that legislative attention was drawn in 1961 to § 229. The California Senate was asked to reconsider its unanimous vote in favor of the Arbitration Act on the ground that there was legislative uncertainty as to its effect upon § 229. 2 Journal of the Senate 2215–2218 (May 4, 1961). The motion to reconsider was later waived, and the bill was transmitted to the Assembly. *Id.*, at 2287 (May 8, 1961). Thus, the Senate had in mind the rights accorded wage earners by § 229, and those rights were placed in focus with the "historical friendliness of California to the institution of arbitration." Feldman, Arbitration Modernized—The New California Arbitration Act, 34 So. Calif. L. Rev. 413, 414 (1961). Section 229 thus survived subsequent legislative scrutiny and has now mani-

[11] Section 1280 was repealed and replaced in 1961 to make the saving clause in § 1281 now read, "save upon such grounds as exist for the revocation of any contract." Cal. Stats. 1961, c. 461, pp. 1540–1541, §§ 1 and 2.

fested itself as an important state policy through interpretation by the California courts.

One might also consider, as the respondent suggests here, the California antitrust policies embodied in § 16600 of the Business and Professions Code, quoted, *supra,* at 121. This statute has been in effect for many years and is well entrenched in case law and in commentary.[12] We need not pursue in depth the policy considerations supporting this statute because, in our judgment, § 16600, standing alone and apart from § 229, under existing case law, would not provide the necessary support to uphold a challenge to arbitration. Our inclination in this respect is buttressed by the different results reached by the California Court of Appeal in this case and in *Frame, supra,* respectively. In *Frame,* the court decided that the "strong [California] public policy" against restraining one from engaging in a lawful business foreclosed the application of the more permissive New York law to the forfeiture provision of the profit-sharing plan. Although California public policy thus served to nullify the contract's forfeiture provision, arbitration, nonetheless, was not precluded. By way of contrast, the present case provoked a claim under § 229, in addition to Ware's reliance on § 16600, in the face of Merrill Lynch's motion to compel arbitration. The California court declared again that the forfeiture clause was invalid but, in addition, held that the arbitration clause was unenforceable, relying on § 16600 and § 229, respectively. With this analysis of the state statutes made by the California court, we rest on that court's interpretation of state law and do not, and in fact cannot, disturb its determination that under those statutes arbitration will lie in the one instance but not in the other.

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[12] See citations following § 16600 in West's Ann. Calif. Bus. & Prof. Code 41 *et seq.*

With this background, we turn to specific arguments advanced by the petitioner here.

III

A. Merrill Lynch suggests that Rule 347 (b) of the New York Stock Exchange, set forth in n. 3, *supra*, falls under the Exchange's mandate to protect the investing public and to insure just and equitable trade practices.[13] Its contention is that confidence in the industry and in the integrity and ability of its members has been jeopardized by failures of major brokerage houses with consequent substantial losses to the public. Investor confidence would be further undermined, it is said, by protracted litigation between member firms and their employees over disputes that arise out of employment relationships; public airing of every claim of this kind will erode confidence in the market; and arbitration, on the other hand, will internalize these disputes and provide an expeditious and economical method of resolution by arbitrators familiar with industry customs and practices.

As is seen by our discussion above, §§ 6 (d) and 19 (b) of the Act, 15 U. S. C. §§ 78f (d) and 78s (b), establish the measure of congressionally delegated authority for self-regulation in the national interest. Section 6 (d) requires that exchange rules be "just and adequate to insure fair dealing and to protect investors." Section 19 (b) gives the Commission limited power over certain types of exchange rules "for the protection of investors

[13] The phrase "just and equitable trade practices" would be inappropriately used to justify Rule 347 (b). This is because the standard refers to rules adopted pursuant to § 6 (b) of the Act, 15 U. S. C. § 78f (b), providing for the expulsion, suspension, or disciplining of a member "for conduct or proceeding inconsistent with just and equitable principles of trade." Arbitration is not the type of disciplinary rule that § 6 (b) contemplates.

or to insure fair dealing in securities" or to "insure fair administration" of the exchanges.[14] Measured by these standards, we conclude that the policy arguments advanced by Merrill Lynch do not require pre-emption of contrary state law by Rule 347 (b).

To begin with the obvious, there is nothing in the Act and there is no Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes.[15] It is also clear that Rule 347 (b) would not be subject to the Commission's modification or review under § 19 (b). The United States, as *amicus,* concedes as much, and we conclude, as the Government suggests, that the relationship between compulsory employer-employee arbitration and fair dealing and investor protection is "extremely attenuated and peripheral, if it exists at all." Brief for the United States 9. Merrill Lynch has not alleged that arbitration will effect fair dealing or result in investor protection. It suggests only that investor confidence not be shaken

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[14] As noted, *supra,* at 129, the Commission's review power over exchange rules is circumscribed by certain subject matter limitations explicitly enumerated in § 19 (b). None of the subject matter categories suggests that the Commission has review authority with respect to a rule requiring arbitration of employer-employee disputes.

[15] This Court and other federal courts, of course, have endorsed the suitability of arbitration to resolve federally created rights. *Wilko* v. *Swan,* 346 U. S. 427, 431 (1953); *Coenen* v. *R. W. Pressprich & Co.,* 453 F. 2d 1209 (CA2), cert. denied, 406 U. S. 949 (1972). See other cases cited by MR. JUSTICE WHITE in his dissenting opinion in *U. S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U. S. 351, 374–375 (1971). These cases, however, concern situations where a federal act itself has provided for arbitration. Yet in *Wilko* v. *Swan* an investor customer's agreement to arbitrate was held void under § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, notwithstanding the provisions of § 3 of the United States Arbitration Act, 9 U. S. C. § 3. See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* 388 U. S. 395 (1967).

further by public airing of employer-employee disputes. There is no explanation of why a judicial proceeding, even though public, would undermine investor confidence. It is difficult to understand why muffling a grievance in the cloakroom of arbitration would prevent lessening of confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored in the light of impartial public court adjudication. Furthermore, it should be apparent that, so far as investor confidence is concerned, compulsory arbitration of an employee-employer grievance is no substitute for direct effective disciplinary action against any abusive exchange practice. Other rules of the Exchange serve this very function. Rule 345 (b), for example, permits the Exchange to disapprove, and thereby to forestall, the employment of any person, and Rule 345 (d) spells out punitive measures for "conduct inconsistent with just and equitable principles of trade," or "acts detrimental to the interest or welfare of the Exchange," or "conduct contrary to an established practice of the Exchange." These measures, designed to insure fair dealing and to protect investors, are of the kind directly related to the Act's purposes and ordinarily would not be expected to yield to provisions of state law.

B. Rule 347 (b) cannot be categorized, as the petitioner suggests, as part of a need for uniform national regulation. There is no revelation in the Act or in any Commission rule or regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary or desirable. And Merrill Lynch has not demonstrated that national uniformity in the area of wage claims is vital, in some way, to federal securities policy. Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in

the Act. Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation. Cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 234–236 (1947); *Campbell* v. *Hussey*, 368 U. S. 297, 302 (1961). Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal Act. Section 6 (c), 15 U. S. C. § 78f (c), explicitly subjects exchange rules to a requirement of consistency with the Act "and the applicable laws of the State in which [the exchange] is located." "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209 (1944). And we observed in *Silver* that the scheme of self-regulation provides in some cases for no agency check on exchange behavior and, therefore, "[s]ome form of review of exchange self-policing, whether by administrative agency or by the courts, is . . . not at all incompatible with the fulfillment of the aims of the Securities Exchange Act." 373 U. S., at 359.

C. It is also argued that the applicable state laws referred to in § 6 (c) are the laws of the State in which the exchange itself is located. Thus, because the New York Stock Exchange is in the city of New York, it is said that "the applicable laws" are those of New York, and that the California court was in error in not applying New York law that would have compelled arbitration of this dispute and would have validated the forfeiture provision of the Profit-Sharing Plan.

We are not persuaded that this is what Congress intended. Section 6 (c) has no independent existence creating some sort of spurious uniformity of application for all States. It has meaning only in the context of the assertion of a federal interest, and it hinges on our determination that the particular rule be integrally related to or substantially effect the aims and purposes of the

Act. It merely requires that any exchange rule adopted outside the context of the Act be consistent with the laws of the State in which the exchange is located.[16]

If the rule is sought to be enforced in another State, normal conflict of laws principles come into play, and the rule's effect depends on the resolution of that conflict. Were this not so, there would be no purpose behind the choice-of-law clause in the Profit-Sharing Plan itself. More importantly, the uniform application Merrill Lynch's interpretation of the Act would purportedly foster is seen to be ephemeral when one considers that broker-dealers like petitioner are also members of exchanges located outside New York, and are therefore subject, under the "state of location" theory, to other States' laws. In effect, we are asked to sacrifice the individual's expectation of uniform treatment in the State of his residence for uniformity of application of the effect of an exchange's rules. We decline to do so because we believe that Congress intended that those elements of the old regime of complete self-regulation, that is, those elements not related to the federal objectives, be subject to state law and to established conflicts principles when their application out of State comes into controversy. After all, a stock exchange is organized as an association in

[16] The Act contains other provisions indicating the intent of Congress that state law continues to apply where the Act itself does not. Thus, § 28 (a), 15 U. S. C. § 78bb (a), states that the rights and remedies provided by the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity." It further provides that nothing in the Act "shall affect the jurisdiction of the securities commission . . . of any State . . . insofar as it does not conflict with the provisions" of the Act "or the rules and regulations thereunder." Section 28 (b), 15 U. S. C. § 78bb (b), provides that nothing in the Act "shall be construed to modify existing law . . . with regard to the binding effect . . . of [exchange] action taken . . . to settle disputes between its members . . . on any person who has agreed to be bound thereby."

accordance with the laws of the State of its location. Any assertion of extraterritorial jurisdiction contends, of course, with the public policy of the State in which this jurisdiction is sought. To ascribe more to § 6 (c) would be contrary to the congressional scheme and to what might be regarded as common sense.

D. MR. JUSTICE BRENNAN has stated:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 142 (1963).

In other contexts, pre-emption has been measured by whether the state statute frustrates any part of the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.,* 372 U. S. 714, 724 (1963); *Perez* v. *Campbell,* 402 U. S. 637 (1971); *Rice* v. *Board of Trade,* 331 U. S. 247, 253–255 (1947). And only last term MR. JUSTICE DOUGLAS, in speaking for the Court, observed that while prior cases on pre-emption "are not precise guidelines," because each case turns on the peculiarities and special features of the federal regulatory scheme in question," it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the federal statutory purposes. *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U. S. 624, 638–639 (1973).

In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relation-

ship. This policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference and we also find in the structure of the Act an intent on the part of Congress that state policies in this area should operate vigorously.

E. It is suggested, finally, that the petitioner's Profit-Sharing Plan operates on a national level; that it is open to all eligible Merrill Lynch employees in the United States; that the employment of respondent and the class he represents is interstate in nature, as is Merrill Lynch's business; and that the application of the California statutes would unduly burden interstate commerce.

What has been said above provides the answer to this argument. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 766–767 (1945); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. R. Co.,* 393 U. S. 129 (1968); *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960).

The judgment of the Court of Appeal is affirmed.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of this case.

Syllabus

CUPP, PENITENTIARY SUPERINTENDENT *v.* NAUGHTEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1148. Argued October 16, 1973—Decided December 4, 1973

At respondent's Oregon criminal trial, the trial judge charged, in accordance with a state statutory provision: "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence or by a presumption." Respondent was convicted and, following exhaustion of his state remedies, brought this federal habeas corpus action. The Court of Appeals, reversing the District Court, concluded that the "presumption of truthfulness" instruction placed the burden of proving innocence upon the defendant and thus did not comport with due process. *Held:* The instruction cannot be considered in isolation and when viewed, as it must be, in the context of the overall charge, in which the trial court twice gave explicit instructions affirming the presumption of innocence and declaring the State's obligation to prove guilt beyond a reasonable doubt, did not so infect the entire trial that the resulting conviction violated the requirements of the Due Process Clause of the Fourteenth Amendment, the challenged instruction having neither shifted the burden of proof to the defendant nor negated the presumption of innocence accorded under state law. *In re Winship*, 397 U. S. 358, distinguished. Pp. 144–150.

476 F. 2d 845, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 150.

John W. Osburn, Solicitor General of Oregon, argued the cause for petitioner. With him on the brief were

Lee Johnson, Attorney General, and *Thomas H. Denney* and *John H. Clough*, Assistant Attorneys General.

Ross R. Runkel, by appointment of the Court, 412 U. S. 904, argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Naughten was tried in an Oregon state court for the crime of armed robbery. The State's principal evidence consisted of testimony by the owner of the grocery store that respondent had robbed the store at gunpoint and of corroborative testimony by another eyewitness. In addition, two police officers testified that respondent had been found near the scene of the robbery and that the stolen money was located near his car in a neighboring parking lot. A few items of clothing, identified as belonging to respondent, and the stolen money were also introduced. Respondent neither took the stand himself nor called any witnesses to testify in his behalf.

The trial judge charged the jury that respondent was presumed innocent "until guilt is proved beyond a reasonable doubt," and then continued:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption." App. 16.

The trial judge also instructed the jury as to the State's burden of proof, defining in detail the concept of reasonable doubt; later, at the respondent's request, he gave an additional instruction on the presumption

of innocence.[1] The jury returned a verdict of guilty, and respondent was sentenced to a term in the state penitentiary.

The Oregon Court of Appeals affirmed respondent's conviction, finding that inclusion of the "presumption of truthfulness" instruction in the judge's charge to the jury was not error. The Supreme Court of Oregon denied a petition for review. His state remedies thus exhausted, respondent sought federal habeas corpus relief in the United States District Court for the District of Oregon, asserting that the presumption-of-truthfulness charge shifted the State's burden to prove guilt beyond a reasonable doubt and forced respondent instead to prove his innocence. The District Court noted that similar instructions had met with disfavor in the federal courts of appeals, but observed that "[those] cases [did] not involve appeals from State Court convictions." Recognizing that the instruction was "proper under Oregon law," the District Court stated:

> "In any event, the giving of the instruction did not deprive petitioner of a federally protected constitutional right." [2]

The Court of Appeals for the Ninth Circuit reversed.[3] That court, noting that the instruction in question "has

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[1] The judge also instructed the jury that respondent did not have to testify and that the jury was to draw no inference of guilt from his failure to do so.

[2] Alternatively, the District Court held that assuming there had been error of constitutional proportions in the charge, the error was harmless in view of the overwhelming evidence of guilt. *Harrington* v. *California*, 395 U. S. 250 (1969). The Court of Appeals, without detailing its reasoning, disagreed, stating that the State had not met its burden of showing that the error was harmless. In view of our disposition of this case, we do not reach that issue.

[3] 476 F. 2d 845, 846 (1972). The court then denied a petition for rehearing by an equally divided vote.

been almost universally condemned" [4] and that Naughten had not testified or called witnesses in his own behalf, went on to say:

> "Thus, the clear effect of the challenged instruction was to place the burden on Naughten to prove his innocence. This is so repugnant to the American concept that it is offensive to any fair notion of due process of law." 476 F. 2d 845, 847.

We granted certiorari to consider whether the giving of this instruction in a state criminal trial so offended established notions of due process as to deprive the respondent of a constitutionally fair trial.

Although the presumption-of-truthfulness instruction apparently became increasingly used in federal criminal prosecutions following the publication of Judge Mathes' Jury Instructions and Forms for Federal Criminal Cases, 27 F. R. D. 39, 67 (1961),[5] the instruction appears to have had quite an independent origin in Oregon practice. The instruction given in Naughten's trial was directly based on § 44.370 of the Oregon Revised

[4] The court cited nine cases from various federal courts of appeals, all of which had expressed disapproval of the presumption-of-truthfulness instruction. See *United States* v. *Birmingham*, 447 F. 2d 1313 (CA10 1971); *United States* v. *Stroble*, 431 F. 2d 1273 (CA6 1970); *McMillen* v. *United States*, 386 F. 2d 29 (CA1 1967), cert. denied, 390 U. S. 1031 (1968); *United States* v. *Dichiarinte*, 385 F. 2d 333 (CA7 1967); *United States* v. *Johnson*, 371 F. 2d 800 (CA3 1967); *United States* v. *Persico*, 349 F. 2d 6 (CA2 1965). See also *United States* v. *Safley*, 408 F. 2d 603 (CA4 1969); *Harrison* v. *United States*, 387 F. 2d 614 (CA5 1968); *Stone* v. *United States*, 126 U. S. App. D. C. 369, 379 F. 2d 146 (1967) (Burger, J.). None of these cases, however, dealt with review of a *state* court proceeding.

[5] Judge Mathes' original instruction was modified in W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 9.01 (1965), and is not included in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (2d ed. 1970). See *id.*, vol. 1, § 12.01, and accompanying note.

Statutes, a provision first passed in 1862. Only four years ago, the Oregon Supreme Court upheld the validity of the instruction against constitutional attack. *State* v. *Kessler,* 254 Ore. 124, 458 P. 2d 432 (1969). At that time the court noted the extensive criticism of similar instructions in the federal courts of appeals and the possible effect of such instructions on the presumption of innocence. Nonetheless, though the court stated that "it might be preferable not to instruct the jury in criminal cases where defendant does not take the stand that a witness is presumed to speak the truth," it concluded that there was no error in giving the instruction "if accompanied by an explanation of how the presumption can be overcome." *Id.,* at 128, 458 P. 2d, at 435. The Oregon Court of Appeals followed that holding in affirming respondent's conviction in this case.

The criticism of the instruction by the federal courts has been based on the idea that the instruction may "dilute," "conflict with," "seem to collide with," or "impinge upon" a criminal defendant's presumption of innocence;[6] "clash with" or "shift" the prosecution's burden of proof;[7] or "interfere" with or "invade" the province of the jury to determine credibility.[8] In fact, in some cases, the courts of appeals have determined that a presumption-of-truthfulness instruction is so undesirable that the defendant may be entitled to a new trial on that ground alone.[9] A reading of these cases, however, indi-

[6] See, *e. g., United States* v. *Johnson, supra,* at 804; *United States* v. *Stroble, supra,* at 1278; *United States* v. *Dichiarinte, supra,* at 339; *Stone* v. *United States, supra,* at 370, 379 F. 2d, at 147.

[7] See, *e. g., United States* v. *Meisch,* 370 F. 2d 768, 774 (CA3 1966); *United States* v. *Birmingham, supra,* at 1315.

[8] See, *e. g., United States* v. *Stroble, supra; United States* v. *Birmingham, supra.*

[9] See, *e. g., United States* v. *Birmingham, supra.* However, the instruction given in *Birmingham* was somewhat different from the instruction given here. The jury there was told that the presump-

cates that the courts of appeals were primarily concerned with directing inferior courts within the same jurisdiction to refrain from giving the instruction because it was thought confusing, of little positive value to the jury, or simply undesirable. The appellate courts were, in effect, exercising the so-called supervisory power of an appellate court to review proceedings of trial courts and to reverse judgments of such courts which the appellate court concludes were wrong.

Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution. Thus even substantial unanimity among federal courts of appeals that the instruction in question ought not to be given in United States district courts within their respective jurisdictions is not, without more, authority for declaring that the giving of the instruction makes a resulting conviction invalid under the Fourteenth Amendment. Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruc-

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tion of truthfulness controlled "[u]nless and until outweighed by evidence to the contrary." 447 F. 2d, at 1315. Apparently no additional instruction was given regarding consideration of the manner or nature of the witnesses' testimony or of the witnesses' possible motivations to speak falsely. See also *Johnson, supra.*

tion to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States,* 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

The Court of Appeals in this case stated that the effect of the instruction was to place the burden on respondent to prove his innocence. But the trial court gave, not once but twice, explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt. The Court of Appeals, recognizing that these other instructions had been given, nevertheless declared that "there was no instruction so specifically directed to that under attack as can be said to have effected a cure." 476 F. 2d, at 847. But we believe this analysis puts the cart before the horse; the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

This Court has recently held that the Due Process Clause requires the State in criminal prosecutions to prove guilt beyond a reasonable doubt. *In re Winship,* 397 U. S. 358 (1970). In that case the judge, presiding over the trial of a juvenile charged with stealing $112 from a woman's pocketbook, specifically found that the

evidence was sufficient to convict under a "preponderance of the evidence" standard but insufficient to convict under a "beyond a reasonable doubt" standard. *Id.*, at 360 and n. 2. Since the judge found that a New York statute compelled evaluation under the more lenient standard, the defendant was found guilty. This Court reversed, stating that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure," *id.*, at 363, and holding explicitly "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364.

We imply no retreat from the doctrine of *Winship* when we observe that it was a different case from that before us now. There the trial judge made an express finding that the State was not required to prove guilt beyond a reasonable doubt; in this case the State's burden of proof was emphasized and re-emphasized in the course of the complete jury instructions. Respondent nevertheless contends that, despite the burden of proof and reasonable-doubt instructions given by the trial court, the charge as to presumption of truthfulness impliedly placed the burden of proof on him. We do not agree.

Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect "impinge" upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed

to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*.

It must be remembered that "review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction." *McNabb* v. *United States*, 318 U. S. 332, 340 (1943). In this case, while the jury was informed about the presumption of truthfulness, it was also specifically instructed to consider the manner of the witness, the nature of the testimony, and any other matter relating to the witness' possible motivation to speak falsely. It thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible. Furthermore, by acknowledging that a witness could be discredited by *his own* manner or words, the instruction freed respondent from any undue pressure to take the witness stand himself or to call witnesses under the belief that only positive testimony could engender disbelief of the State's witnesses.

The jury here was charged fully and explicitly about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension. The giving of that instruction, whether judged in terms of the reasonable-doubt requirement in *In re Winship, supra*, or of offense against "some principle of justice so rooted in

the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934), did not render the conviction constitutionally invalid.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Respondent was found guilty of armed robbery and assault, after the jury had been charged, in pertinent part, as follows:

> "The law provides for certain disputable presumptions which are to be considered as evidence.
>
> "A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence. *However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.*
>
> "The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.
>
> *"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.*
>
> "Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt." (Emphasis added.)

A timely objection was taken to the part instructing upon the presumption of truthfulness. In my view

the charge permitted the jury to convict even though the evidence may have failed to establish respondent's guilt beyond a reasonable doubt, and therefore denied respondent due process of law.

The charge directed the jury to find that the State's witnesses had spoken the truth, unless the presumption of truthfulness were "overcome" by demeanor, impeachment, or contradictory evidence. This instruction followed an earlier instruction that a presumption could be rebutted by other evidence which "out-weighed or equaled" the presumption, but that otherwise "the law expressly direct[ed]" that a finding be made in accordance with the presumption. Considered together, these instructions clearly required the jury to believe a witness' testimony until his or her untruthfulness had been demonstrated by evidence making it appear as likely as not that the testimony was false.[1] Since the State's case rested almost entirely upon the testimony of two eyewitnesses and two police officers, see *ante,* at 142, and since respondent neither called witnesses nor took the stand himself, the practical effect of the court's instructions was to convert the State's burden of proving guilt beyond a reasonable doubt to proving guilt by a preponderance of the evidence.[2]

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[1] Due to the structuring of the instructions it is conceivable that the jurors would have understood that, since the presumption of innocence could be overcome only by proof of guilt beyond a reasonable doubt, the presumption of truthfulness could likewise be overcome only by evidence of untruthfulness beyond a reasonable doubt. If the instructions were in fact understood in this manner, the ensuing arguments concerning the unconstitutionality of the instructions would follow *a fortiori.*

[2] The courts of appeals in every circuit have disapproved of presumption-of-truthfulness instructions and have often expressed their objections in terms of constitutional values. See *McMillen* v. *United States,* 386 F. 2d 29 (CA1 1967); *United States* v. *Bilotti,* 380 F.

The reduction of the prosecution's burden of persuasion to a preponderance clearly conflicts with the Due Process Clause guarantee that an accused shall not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970). In *Cool* v. *United States*, 409 U. S. 100 (1972), we held that an "unacceptable risk" existed that the jury might have understood an instruction—that certain defense testimony could properly be considered if found to be true beyond a reasonable doubt—as requiring that the defense testimony be considered *only* if believed beyond a reasonable doubt. *Id.*, at 102 n. 3. Over a dissent which asserted that the Court was parsing instructions and engaging in semantical distinctions without considering the trial court's charge to the jury as a whole, *id.*, at 107–108, the instruction was found "fundamentally inconsistent" with our *Winship* decision, since a possibility existed that exculpatory testimony—that would have

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2d 649 (CA2 1967); *United States* v. *Evans*, 398 F. 2d 159 (CA3 1968); *United States* v. *Safley*, 408 F. 2d 603 (CA4 1969); *United States* v. *Reid*, 469 F. 2d 1094 (CA5 1972); *United States* v. *Stroble*, 431 F. 2d 1273 (CA6 1970); *United States* v. *Dichiarinte*, 385 F. 2d 333 (CA7 1967); *United States* v. *Gray*, 464 F. 2d 632 (CA8 1972); the instant case, *Naughten* v. *Cupp*, 476 F. 2d 845 (CA9 1972); *United States* v. *Birmingham*, 447 F. 2d 1313 (CA10 1971); *Stone* v. *United States*, 126 U. S. App. D. C. 369, 379 F. 2d 146 (1967). But the courts have been particularly concerned about the impact that such instructions might have when the defendant has not offered testimony. See *United States* v. *Safley*, *supra*, at 605; *United States* v. *Boone*, 401 F. 2d 659, 661 (CA3 1968); *United States* v. *Evans*, *supra*, at 162; *United States* v. *Dichiarinte*, *supra*, at 339; *Stone* v. *United States*, *supra*, at 370, 379 F. 2d, at 147; *United States* v. *Johnson*, 371 F. 2d 800, 805 (CA3 1967); *United States* v. *Meisch*, 370 F. 2d 768, 774 (CA3 1966). However, even in a situation where the defendant has introduced rebuttal testimony, the impact of the presumption on the parties will be imponderable and not necessarily equal. See *McMillen* v. *United States*, *supra*, at 33.

created a reasonable doubt in the minds of the jurors—had been rejected because not believable beyond a reasonable doubt. *Id.*, at 104. Thus, the evil in *Cool* was the unacceptable risk that jurors would understand the instruction to require that defense testimony be rejected out of hand which, if considered, might have given rise to a reasonable doubt about the defendant's guilt. Respondent suffered no less a constitutional deprivation when, in unequivocal terms, the jury was instructed to accept the statements of prosecution witnesses as true even though the jurors might have entertained substantial and reasonable doubts about the veracity of the testimony—but not sufficient to conclude that it was as likely as not that the testimony was false.

Moreover, the presumption-of-truthfulness instruction itself is constitutionally defective. In *Turner* v. *United States*, 396 U. S. 398 (1970), we approved an inference of "knowledge" from the fact of possessing smuggled heroin, because "'[c]ommon sense' . . . tells us that those who traffic in heroin will *inevitably* become aware that the product they deal in is smuggled," *id.*, at 417; at the same time, we rejected the presumption that possession of unstamped cocaine was prima facie evidence that the drug was not purchased in or from the original stamped container, because a *"reasonable possibility"* existed that the defendant "stole the cocaine himself or obtained it from a stamped package in possession of the actual thief." *Id.*, at 423–424 (emphasis added). In the instant case, common sense does not dictate that a prosecution witness who has sworn or affirmed to tell the truth will *inevitably* do so, and there is surely a *reasonable possibility* that he will fail to do so.[3] Since here no defense witnesses were

[3] The origins of the presumption that witnesses will testify truthfully appear to extend back at least into the 19th century, see

called, the practical effect of the presumption of truthfulness was to permit the jury to find each and every element of the crimes charged without requiring that the elements be proved beyond a reasonable doubt. The presumption itself thus violates the mandate of *Winship* that "every fact necessary to constitute the crime" be proved beyond a reasonable doubt. See *Barnes* v. *United States*, 412 U. S. 837, 854 (1973) (BRENNAN, J., dissenting).

Viewed in the context of the overall charge to the jury, the instructions were no less objectionable. To be sure—as had been the case in *Cool*—the jurors were instructed that guilt must be proved beyond a reasonable doubt. However, they were also directed in effect to ignore certain doubts they might have entertained concerning the credibility of the prosecution's witnesses. Had the instructions concerning the reasonable-doubt standard necessarily *contradicted* the instructions dealing with the burden of proof needed to overcome the truthfulness presumption, the constitutional objection might have been dissipated. But there is, in my view, an "unacceptable risk" that the jury understood the instructions unambiguously to require that they put to one side certain doubts about the credibility of the testimony they had heard and only then determine whether the evidence

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ante, at 144–145, when it was a widely held belief that a willful violation of the oath would expose the witness "at once to temporal and to eternal punishment." T. Starkie, Law of Evidence 29 (10th Am. ed. 1876). In addition, at that time many of the common-law rules of incompetency were applied to disqualify individuals from testifying for reasons which today would merely be grounds for impeachment. See generally 9 W. Holdsworth, History of English Law 177–197 (1926); C. McCormick, Evidence, c. 7 (2d ed. 1972). Since that time, the rationale underlying the presumption has been substantially undercut.

supported a finding of guilt beyond a reasonable doubt.[4] I therefore conclude that the instructions are constitutionally infirm.

In this circumstance, the constitutional error inhering in the instruction cannot properly be viewed as harmless beyond a reasonable doubt. See *Chapman* v. *California,* 386 U. S. 18, 24 (1967). The reasonable-doubt standard reduces the risk that an error in factfinding could deprive an innocent man of his good name and freedom. See *In re Winship, supra,* at 363–364. It also impresses the jurors with their solemn responsibility to avoid being misled by suspicion, conjecture, or mere appearance, and to arrive at a state of certainty concerning the proper resolution of the relevant factual issues. Here, the truth-finding function of the jury was invaded and the State's burden of proving guilt beyond a reasonable doubt was diminished. When the reasonable-doubt standard has been thus compromised, it cannot be said beyond doubt that the error "made *no* contribution to a criminal conviction." *Harrington* v. *California,* 395 U. S. 250, 255 (1969) (dissenting opinion). Rather, such an error so conflicts with an accused's right to a fair trial that the "infraction can never be treated as harmless error." *Chapman* v. *California, supra,* at 23.

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[4] The majority's reliance on *Boyd* v. *United States,* 271 U. S. 104 (1926), *ante,* at 146–147, is misplaced. There it was found that an "ambiguous" statement in the charge in a criminal case was likely understood in its harmless sense because of additional curative instructions. *Id.,* at 107. The disputed instruction, even if erroneous, concerned a question of law under the Harrison Anti-Narcotic Act not of constitutional dimension, and the Court relied on the fact that a proper objection had not been taken to the charge. See *id.,* at 107–108.

NORTH DAKOTA STATE BOARD OF PHARMACY *v.* SNYDER'S DRUG STORES, INC.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 72–1176. Argued November 6, 1973—
Decided December 5, 1973

The North Dakota Supreme Court, relying on *Liggett Co.* v. *Baldridge*, 278 U. S. 105, held unconstitutional a state statute, under which respondent had been denied a pharmacy operating permit, requiring that an applicant for such a permit be "a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy." The court remanded the case so that petitioner Board could conduct an administrative hearing "*sans* the constitutional issue," on respondent's alleged failure to meet certain structural and safety standards on which petitioner had also rested its permit denial. *Held:*

1. This Court does not lack jurisdiction to review the State Supreme Court's judgment, which is "final" within the meaning of 28 U. S. C. § 1257, for it is not apparent how petitioner Board would be able to preserve the constitutional issue now ready for adjudication without defying the State Supreme Court. Pp. 159–164.

2. The North Dakota statutory requirements for permitting the operation of a pharmacy do not violate the Due Process Clause of the Fourteenth Amendment. In enacting the challenged legislation the State was well within its authority "to legislate against what [it] found to be injurious practices in [its] internal commercial and business affairs," *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, 536, and this Court will not substitute its own judgment for what the State feels is reasonably necessary to protect the interests of the public. *Liggett Co.* v. *Baldridge*, *supra*, overruled. Pp. 164–167.

202 N. W. 2d 140, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court.

A. William Lucas argued the cause and filed briefs for petitioner.

Mart R. Vogel argued the cause and filed a brief for respondent.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

North Dakota passed a statute [1] that requires that the applicant for a permit to operate a pharmacy be

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**Arthur B. Hanson, Ralph N. Albright, Jr.*, and *Sidney Waller* filed a brief for the American Pharmaceutical Assn. et al. as *amici curiae* urging reversal.

Thomas D. Quinn, Jr., and *Harold Rosenwald* filed a brief for the National Association of Chain Drug Stores, Inc., as *amicus curiae* urging affirmance.

[1] N. D. Cent. Code § 43–15–35 (5) (Supp. 1973) provides:

"*Requirements for permit to operate pharmacy.*—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

. . . . . .

"5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy . . .

. . . . . .

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital."

"a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy."

Petitioner Board denied a permit to Snyder's Drug Stores, Inc., because it did not comply with the stock-ownership requirements of the statute, it appearing that all the common stock of Snyder's was owned by Red Owl Stores and it not being shown if any Red Owl shareholders were pharmacists registered and in good standing in North Dakota. On appeal to the state district court, summary judgment was granted Snyder's. On appeal to the Supreme Court of North Dakota, that court held [2] that the North Dakota statute was unconstitutional by reason of our decision in 1928 in *Liggett Co.* v. *Baldridge,* 278 U. S. 105. That case involved a Pennsylvania statute that required that 100% of the stock of the corporation be owned by pharmacists. The North Dakota statute, however, requires only that a majority of the stock be owned by pharmacists. But the North Dakota Supreme Court held that the difference did not take this case out from under the *Liggett* case because under both statutes control of the corporation having a pharmacy license had to be in the hands of pharmacists responsible for the management and operation of the pharmacy. That court therefore remanded the case, so that the Board could conduct "an administrative hearing on the application, *sans the constitutional issue,* pursuant to our Administrative Agencies Practice Act," 202 N. W. 2d 140, 145 (italics added).

The case is here on a petition for certiorari which we granted, 411 U. S. 947.

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[2] 202 N. W. 2d 140.

I

We are met at the outset with a suggestion that the judgment of the Supreme Court of North Dakota is not "final" within the meaning of 28 U. S. C. § 1257 which restricts our jurisdiction to review state court decisions.[3]

The finality requirement of 28 U. S. C. § 1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Mr. Justice Frankfurter, writing for the Court in *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 124, summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be "final":

> "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene

[3] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ." 28 U. S. C. § 1257.

> in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U. S. C. § 344 (a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

But, as he pointed out, this concept of "finality" has a "penumbral area." *Ibid.* Speaking for the Court in that case, he held that Nebraska's ruling on the legality of a radio license issued by the Federal Communications Commission could be reviewed even though the state court had not yet determined the final accounting. He stated: "Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." *Id.*, at 127.

Mills v. *Alabama*, 384 U. S. 214, involved the constitutionality of a state statute in effect making it a crime for a newspaper editor on election day to urge people to vote a certain way on the issues being submitted. The state court held the act did not violate the Federal Constitution and remanded the case for trial. It was argued that the judgment was not "final" for purposes of 28 U. S. C. § 1257. We noted that the point had "a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case." 384 U. S., at 217. We held it "final," however, because if the Act were constitutional the editor would in reality have no defense. Since conviction seemed likely, we concluded that to deny review at that stage would "result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.*, at 217–218.

In *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, the question on the merits was whether the require-

ment of a state act setting minimum retail prices was consonant with federal law. The state court held the state act constitutional under both the State and the Federal Constitutions and remanded the case for further proceedings. In reliance on *Curry* and on *Langdeau* [4] we held that the fact that there were to be further proceedings in the state court did not render the state judgment "nonfinal or unappealable within the meaning of 28 U. S. C. § 1257." *Id.*, at 389 n. 4.

The exceptions noted [5] have a long lineage dating back

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[4] We held in *Local No. 438* v. *Curry*, 371 U. S. 542, that a state court judgment which authorized a temporary injunction against picketing because in the court's view the National Labor Relations Board did not have exclusive jurisdiction was "final" for purposes of 28 U. S. C. § 1257. We did not wait until the litigation had been resolved in the state court, as the state court had finally determined its jurisdiction and erroneously so. 371 U. S., at 548.

In *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, a receiver for a Texas insurance company sued two national banks, and the only question tendered on appeal from the state court concerned the question of venue, *viz.*, in what state court a national bank could be sued. It was argued that the state court judgment was not "final" for purposes of 28 U. S. C. § 1257. We rejected that view, holding the judgment "final" and saying: "[W]e believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U. S., at 558.

[5] In *California* v. *Stewart*, 384 U. S. 436, 498–499, in a capital case the State Supreme Court set aside the verdict on a federal constitutional ground and directed that the defendant (respondent) be retried. He moved that we dismiss the State's petition, which we had granted, for lack of a "final" judgment. We noted, however, that if on a retrial he were acquitted, there was no appeal available to the State. We therefore held that the judgment under review was "final" for our purposes. *Id.*, at 498 n. 71.

In *Brady* v. *Maryland*, 373 U. S. 83, the state court had given a defendant post-conviction relief and remanded the case for retrial

to Mr. Chief Justice Taney's opinion in *Forgay* v. *Conrad*, 6 How. 201, where the Court held "final" an interlocutory decree requiring a litigant "to deliver up property which he claims," even though a final accounting has yet to be made. *Id.*, at 205. Unless that interlocutory order was deemed "final," Mr. Chief Justice Taney pointed out, the "right of appeal is of very little value to him and he may be ruined before he is permitted to avail himself of the right." *Ibid.*

It is equally important that we treat the judgment in the instant case as "final," for we have discovered no way which the licensing authority in North Dakota has of preserving the constitutional question now ripe for decision.

The Board here denied respondent's application without an evidentiary hearing since the application showed that under the North Dakota Act respondent could in no way qualify for a license. The State Supreme Court held that Act unconstitutional and that thus an applicant failing to meet the requirements of the state statute is nevertheless entitled to consideration for a license. As previously noted, the State Supreme Court, indeed, directed the Board on remand to reconsider the application *"sans"* the constitutional question.

There were state law questions to be considered on the remand, for the state board had also rested its denial of a permit on the failure of Snyder's to meet certain structural and safety standards. The Supreme Court

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on the question of punishment. We took the case to determine whether the suppression of evidence by the prosecution entitled the defendant to a retrial on the issue of guilt as well as punishment. We held that the issue of guilt was quite independent of the issue of punishment and that it was time to decide the due process and/or equal protection questions presented by the state decision.

remanded for an administrative hearing on those other issues.

If we deny review at this point, respondent has no constitutional barrier to the grant of a license.

The state licensing authority might, of course, after an administrative hearing reinstate its earlier findings that the respondent does not meet the necessary structural and safety standards. If respondent is denied a license for that reason, the denial will obviously be on a state ground. If respondent is granted a license, the battle over the constitutionality of the new Act will be lost as far as this case is concerned.

There is no suggestion that "the remaining litigation may raise other federal questions," *Radio Station WOW* v. *Johnson,* 326 U. S., at 127, "such as is true of eminent domain cases." *Ibid.* For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem. See *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256.

It would appear that, as a matter of North Dakota procedure, the only way in which the Board could preserve the constitutional issue would be to defy its own State Supreme Court and deny the application on the ground of failure to meet the ownership requirement. The state Administrative Agencies Practice Act provides that: "Any party to any proceeding heard by an administrative agency" may appeal from the decision of the agency. N. D. Cent. Code § 28–32–15. The statute appears to treat the agency as a tribunal and not as a "party" able to appeal its own order.

If the Board thus grants the license in accordance with the State Supreme Court decision and then seeks to appeal its own grant on the basis of the validity of the state ownership requirement, the appeal may well be

dismissed and the dismissal would rest on the independent state ground that state procedural law does not provide the agency the right to appeal.

II

Liggett, decided in 1928, belongs to that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise. *Liggett* has to date not been expressly overruled. We commented on it disparagingly, however, in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, which concerned the constitutionality of a state statute providing that life insurance companies and their agents may not operate an undertaking business and undertakers may not serve as agents for life insurance companies. We noted that *Liggett* held that it was "clear" that "mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business," 278 U. S., at 113. In *Daniel*, however, we stated that "a pronounced shift of emphasis since the *Liggett* case," 336 U. S., at 225, had deprived the words "unreasonable" and "arbitrary" of the meaning which *Liggett* ascribed to them. We had indeed held in *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525, that a State had power, so far as the Due Process Clause of the Fourteenth Amendment was concerned, to legislate that no person should be denied the opportunity to obtain or retain employment because he was or was not a member of a labor union. After reviewing *Nebbia* v. *New York*, 291 U. S. 502, *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, we said:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily

> rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U. S., at 536–537.

We reached the same result in *Ferguson* v. *Skrupa,* 372 U. S. 726, where we sustained the constitutionality of a state law prohibiting persons other than lawyers from engaging in the business of debt adjusting and debt pooling. We said:

> "We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature

takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." *Id.*, at 731–732 (footnotes omitted).

The majority of the Court in *Liggett* for which Mr. Justice Sutherland spoke held that business or property rights could be regulated under the Fourteenth Amendment only if the "legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare," 278 U. S., at 111–112. The majority held the Act governing pharmacies "creates an unreasonable and unnecessary restriction upon private business." *Id.*, at 113. The opposed view stated by Mr. Justice Holmes, and concurred in by Mr. Justice Brandeis, was:

"A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual

> investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Id.*, at 114–115.

Those two opposed views of public policy are considerations for the legislative choice. The *Liggett* case was a creation at war with the earlier constitutional view of legislative power, *Munn* v. *Illinois*, 94 U. S. 113, 132, 134, and opposed to our more recent decisions. *Olsen* v. *Nebraska*, 313 U. S. 236, 241; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, as well as the *Daniel, Lincoln Union*, and *Ferguson* cases already discussed. The *Liggett* case, being a derelict in the stream of the law, is hereby overruled. We reverse and remand the judgment below and free the courts and agencies of North Dakota from what the State Supreme Court deemed to be the mandate of *Liggett*.

So ordered.

GOLDEN STATE BOTTLING CO., INC., FORMERLY PEPSI-COLA BOTTLING CO. OF SACRAMENTO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–702. Argued October 11, 1973—
Decided December 5, 1973

Petitioner All American Beverages, Inc. (All American), purchased the soft drink bottling and distribution business of petitioner Golden State Bottling Co. (Golden State) after the National Labor Relations Board (NLRB) had ordered Golden State, "its officers, agents, successors, and assigns" to reinstate with backpay a driver-salesman whose discharge by Golden State was found to have been an unfair labor practice. In a subsequent back-pay specification proceeding to which both firms were parties, upon finding that All American after the acquisition continued the business without interruption or substantial change in operations, employee complement, or supervisory personnel, and that hence All American, having acquired the business with knowledge of the outstanding NLRB order, was a "successor" for purposes of the National Labor Relations Act (NLRA) liable for the reinstatement of the driver-salesman with backpay, the NLRB ordered All American to reinstate him and both firms jointly or severally to pay him a specified sum of backpay. The Court of Appeals enforced the order. *Held:*

1. The Court of Appeals did not err in determining that, on the record as a whole, substantial evidence supported the NLRB's finding that All American purchased the business with knowledge of the unfair labor practice litigation, since it cannot be said on the basis of the record that the Court of Appeals "misapprehended or grossly misapplied" the standard of review. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474. Pp. 172–174.

2. The issuance of a reinstatement and backpay order against a bona fide successor that did not itself commit the unfair labor practice does not exceed the NLRB's remedial powers under § 10 (c) of the NLRA, since such powers include broad discretion to fashion and issue such an order in order to achieve the ends and effectuate the policies of the Act. Pp. 175–177.

3. Federal Rule Civ. Proc. 65 (d), which provides that injunctions and restraining orders shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order, does not bar judicial enforcement of the NLRB order running to All American, since a bona fide successor, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65 (d). Pp. 177–181.

4. The NLRB properly exercised its discretion in issuing the order against All American by striking an equitable balance among the conflicting legitimate interests of the bona fide successor, the public, and the affected employee for purposes of effectuating the national labor policies of avoiding labor strife, preventing a deterrent effect on the exercise of rights guaranteed employees by § 7 of the NLRA, and protecting the victimized employee, such policies being achieved at a relatively minimal cost to the bona fide successor. Pp. 181–185.

5. The NLRB did not err in ordering both firms jointly or severally to pay the driver-salesman a specified sum of backpay, since an offending predecessor-employer should at least be required to make the dischargee whole for any loss of pay suffered by reason of the discharge until such time as he secures substantially equivalent employment, since joint and several liability will more fully insure that the employee is fully recompensed by protecting him against, *e. g.*, the successor's insolvency, and since the possibility that the successor will unjustifiably delay reinstatement to the predecessor's prejudice can be met by a protective provision in the contract of sale. Pp. 186–187.

6. The fact that the driver-salesman, but for his discharge as an ordinary employee would, under Golden State's policy, have become a distributor about a year later and as an independent contractor would have been excluded from NLRA coverage, did not preclude the NLRB from including in the gross backpay computation the dischargee's putative earnings as a distributor, since a reinstatement and backpay order is aimed at restoring the status quo that would have obtained but for the employer's unfair labor practice. Pp. 187–189.

467 F. 2d 164, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Morton B. Jackson argued the cause for petitioners. With him on the briefs was *Gilford G. Rowland.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General Bork, Allan A. Tuttle, Peter G. Nash, John S. Irving, Patrick Hardin,* and *William H. DuRoss III.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The principal question for decision in this case is whether the bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with backpay.

Petitioners are Golden State Bottling Co., Inc. (Golden State), and All American Beverages, Inc. (All American). All American bought Golden State's soft drink bottling and distribution business after the National Labor Relations Board had ordered Golden State, "its officers, agents, successors, and assigns" to reinstate with back pay a driver-salesman, Kenneth L. Baker, whose discharge by Golden State was found by the Board to have been an unfair labor practice.[1] In a subsequent back-

[1] On June 10, 1964, the Board found that Golden State violated §§ 8 (a) (3) and (1) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a) (3) and (1), by discharging Baker, on August 16, 1963, because of union activities, and ordered Baker's reinstatement with backpay. 147 N. L. R. B. 410. On December 2, 1965, the Court of Appeals for the Ninth Circuit enforced the Board's order with respect to Baker. 353 F. 2d 667. Due to a delay in the Court of Appeals' disposition of the Board's petition for rehearing on a portion of the court's decision unrelated to Baker, a final decree was not entered until November 27, 1968, see 401 F. 2d 454.

pay specification proceeding to which both Golden State and All American were parties, see 29 CFR §§ 102.52–102.59, the Board found that All American continued after the acquisition to carry on the business without interruption or substantial changes in method of operation, employee complement, or supervisory personnel. In that circumstance, although All American was a bona fide purchaser of the business, unconnected with Golden State, the Board found that All American, having acquired the business with knowledge of the outstanding Board order, was a "successor" for purposes of the National Labor Relations Act and liable for the reinstatement of Baker with backpay under the principles announced in *Perma Vinyl Corp.*, 164 N. L. R. B. 968 (1967), enforced *sub nom. United States Pipe & Foundry Co.* v. *NLRB*, 398 F. 2d 544 (CA5 1968).[2] The Board therefore ordered that

[2] *Perma Vinyl* states the principles and their rationale as follows:

"To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

"In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all

All American reinstate Baker and that Golden State and All American jointly or severally pay Baker a specified sum of net backpay. 187 N. L. R. B. 1017 (1971). The Court of Appeals for the Ninth Circuit, one judge dissenting, enforced the order, 467 F. 2d 164 (1972). We granted certiorari, 410 U. S. 953 (1973). We affirm.

I

There is a threshold question of whether the Court of Appeals erred in determining that the evidence "offered substantial support for the Board's finding that All American purchased [the bottling business] with knowledge of the unfair labor practice litigation." 467 F. 2d, at 165. We address that question mindful of the congressionally imposed limitation on this Court's review of the Court of Appeals' determination:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance *when the standard appears to have been misapprehended or grossly misapplied. Universal Camera Corp.* v.

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employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." 164 N. L. R. B. 968, 969 (footnotes omitted).

NLRB, 340 U. S. 474, 491 (1951). (Emphasis added.)

Thus limited, we cannot find fault with the Court of Appeals' conclusion that, on the record as a whole, substantial evidence supported the Board's finding that All American purchased the business with knowledge of the unfair labor practice litigation. Eugene Schilling, Golden State's secretary and manager of the bottling business, who had discharged Baker and then closely followed the progress of the litigation, continued with the enterprise under All American's ownership with the title of general manager and "president." Indeed, All American's purchase of the business was conditioned on Schilling's staying on in a managerial capacity; the sales contract expressly stipulated that Schilling "shall have agreed to be employed by [All American] for a period of one year after the Closing Date as General Manager . . . ." Schilling participated on at least one occasion with Golden State's president, Edwin J. Crofoot, in the sale negotiations. Even if strict agency principles would not impute Schilling's knowledge to All American until Schilling actually entered its employ, see Restatement (Second) of Agency § 9 (3) (1958); *Thomas Engine Corp.*, 179 N. L. R. B. 1029, 1042 (1970), enforced *sub nom. UAW* v. *NLRB*, 442 F. 2d 1180 (CA9 1971), the Court of Appeals cannot be said to have "misapprehended or grossly misapplied" the governing standard in appraising this evidence as sufficiently substantial to support an inference that Schilling informed his prospective employer of the litigation before completion of the sale. It is true that both Schilling and Crofoot testified at the hearing in the specification proceeding that they had not informed All American of the litigation before the sale was completed. But the trial examiner refused to credit their testimony in light of documentary evidence from which he inferred that the Golden State officials had

attempted to conceal the sale from the Board, 187 N. L. R. B., at 1021. The examiner also refused to credit Crofoot's testimony that, while All American expressly asked him whether any litigation was pending, he did not mention the unfair labor practice case because he had forgotten it, although admitting that he had authorized payment of substantial fees in connection with it. *Ibid.* Finally, the examiner inferred from the unexplained failure of All American to produce its negotiators as witnesses that their testimony would not have supported All American's disclaimer of knowledge.[3]

On this state of the record, there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. "This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ." *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 548 (1972).

II

The Board has pursued an uneven course in its treatment of a bona fide successor's liability to remedy the unfair labor practices of its predecessor. In 1944 the Board determined that liability would not be imposed on a bona fide successor, *South Carolina Granite Co.*, 58 N. L. R. B. 1448, enforced *sub nom. NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945). In 1947 the Board abandoned that view and determined that joint and several remedial responsibility would be imposed upon a bona fide successor who had knowledge of the seller's unfair labor practice at the time of the purchase, *Alex-*

[3] See, *e. g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226 (1939); *NLRB* v. *Dorn's Transp. Co., Inc.*, 405 F. 2d 706, 713 (CA2 1969).

ander Milburn Co., 78 N. L. R. B. 747. When, however, two Courts of Appeals refused to enforce remedial orders against bona fide successors, *NLRB* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (CA10 1953), and *NLRB* v. *Lunder Shoe Corp.*, 211 F. 2d 284 (CA1 1954), the Board, in 1954, re-examined and overruled *Alexander Milburn Co.*, declaring, in *Symns Grocer Co.*, 109 N. L. R. B. 346, that "[n]o provision of the [National Labor Relations] Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." *Id.*, at 348. Finally, in 1967, in yet another turnabout, the Board overruled *Symns Grocer Co.* in *Perma Vinyl, supra,* and announced that, in circumstances there defined, see n. 2, *supra,* remedial orders would be imposed upon bona fide successors for the unfair labor practices of their predecessors.

We must consider at the outset whether the issuance of a reinstatement and backpay order against a bona fide successor exceeds the Board's remedial powers under § 10 (c) of the Act, 29 U. S. C. § 160 (c). Section 10 (c), in pertinent part, provides:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that *any person named in the complaint has engaged in . . . any such unfair labor practice,* then the Board . . . shall issue and cause to be served on such person an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act . . . .*" (Emphasis added.)

The Board's restrictive view in *Symns Grocer Co.* of its remedial powers derived from a limitation perceived to inhere in the words "any *person* named in the complaint has engaged in . . . any such unfair labor practice"

(emphasis added). These words were regarded as precluding authority to issue remedial orders against persons, like bona fide successors, who had not perpetrated the unfair labor practice. In *Perma Vinyl,* however, the Board found a broader authority in the words of the section authorizing the Board "to take such affirmative action . . . as will effectuate the policies of this Act." These words were construed as granting "broad administrative power . . . to frame such remedial orders . . . not, of course, restricted to requiring remedial action by the offending employer alone," 164 N. L. R. B., at 969, as were necessary to further the public interest subserved by the Act. See *NLRB* v. *Colten,* 105 F. 2d 179 (CA6 1939).

We agree that the Board's remedial powers under § 10 (c) include broad discretion to fashion and issue the order before us as relief adequate to achieve the ends, and effectuate the policies, of the Act. Early on, this Court recognized that § 10 (c) does not limit the Board's remedial powers to the actual perpetrator of an unfair labor practice and thereby prevent the Board from issuing orders binding a successor who did not himself commit the unlawful act. We have said that a Board order that, as in this case, runs to the "officers, agents, successors, and assigns" of an offending employer, may be applied, not only to a new employer who is "merely a disguised continuance of the old employer," *Southport Petroleum Co.* v. *NLRB,* 315 U. S. 100, 106 (1942), but also " 'in appropriate circumstances . . . [to] those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons.*' " *Regal Knitwear Co.* v. *NLRB,* 324 U. S. 9, 14 (1945) (emphasis added); see also *NLRB* v. *Ozark Hardwood Co.,* 282 F. 2d 1, 5 (CA8 1960). If the words "person named in the complaint has engaged in . . . any . . . unfair labor practice" in § 10 (c) do not restrict Board authority to prevent

orders running to the offending employer's successors and assigns who have acquired the business as a means of evading the Board order, we do not see how those words may be read to bar the Board from issuing reinstatement and backpay orders against bona fide successors when the Board has properly found such orders to be necessary to protect the public interest in effectuating the policies of the Act. The Board's orders run to the evader and the bona fide purchaser, not because the act of evasion or the bona fide purchase is an unfair labor practice, but because the Board is obligated to effectuate the policies of the Act. Construing § 10 (c) thus to grant the Board remedial power to issue such orders results in a reading of the section, as it should be read, in the light of " 'the provisions of the whole law, and . . . its object and policy.' " *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956); see *NLRB* v. *Lion Oil Co.,* 352 U. S. 282, 288 (1957).

It is also argued, however, that Fed. Rule Civ. Proc. 65 (d), in any event, is a bar to judicial enforcement of a Board order requiring that a bona fide successor reinstate with backpay an employee illegally discharged by its predecessor. We disagree.[4] Rule 65 (d) provides that

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[4] A short answer to petitioners' argument might appear to be that, because the Board's supplemental order to All American required only reinstatement and backpay, and not that All American cease and desist from future unlawful activity, no injunctive relief was ordered, and therefore Rule 65 (d) need not be considered. But we have previously found Rule 65 (d) applicable to mandatory injunctions and have noted that the courts of appeals have applied it "not only to prohibitory injunctions but to enforcement orders and affirmative decrees as well." *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.,* 389 U. S. 64, 75 and n. 14 (1967); see generally Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1061–1063 (1965).

In not requiring the bona fide purchaser to cease and desist, the Board followed prior practice. See *Thomas Engine Corp.,* 179

injunctions and restraining orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." See generally O. Fiss, Injunctions 691–700 (1972). We reject petitioners' contention that *Regal Knitwear Co.* v. *NLRB*, *supra*, at 14, supports the argument that this Rule is a bar to judicial authority to enforce Board orders against bona fide successors. In *Regal Knitwear*, the Court refused the offending employer's application to strike the phrase "successors and assigns" from the Board's order, citing *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671 (1944), which involved an injunction against violation of the Fair Labor Standards Act. *Regal Knitwear* treated a Board cease-and-desist order as "somewhat analogous" to such an injunction, and stated:

> " 'Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been

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N. L. R. B. 1029 and n. 4 (1970), enforced *sub nom. UAW* v. *NLRB*, 442 F. 2d 1180 (CA9 1971). This approach seems consistent with the fact that the successor's obligations do not arise out of its own unfair labor practices. The Board's practice after its earlier decision in *Alexander Milburn Co.*, 78 N. L. R. B. 747 (1947), had been to order the bona fide purchaser to cease and desist. This may account for decisions of the courts of appeals, *e. g.*, *NLRB* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234, 236 (CA10 1953), opposing the Board's position in *Alexander Milburn*, which eventually led to the Board's overruling of that decision in *Symns Grocer Co.*, 109 N. L. R. B. 346 (1954). See DuRoss, Protecting Employee Remedial Rights Under the Perma Vinyl Doctrine, 39 Geo. Wash. L. Rev. 1063, 1089 (1971).

transferred, whether as a means of evading the judgment or for other reasons.' . . .

"We do not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. . . . [W]hether one brings himself in contempt as a 'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." 324 U. S., at 14–15.

Plainly then, *Regal Knitwear* recognizes that Rule 65 (d) is not a bar to enforcement of all Board orders running to successors or assigns not themselves offending employers. The Court simply left open the question of whether the Rule precludes the enforcement of remedial orders running to a successor who is a bona fide purchaser. We answer that question today by holding that the Rule is not a bar to judicial enforcement of the Board order entered against the bona fide successor in this case.

Rule 65 (d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear,* 324 U. S., at 14. Persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge. Restatement of Judgments § 89, and comment *c* (1942); see 1 J. Story, Equity Jurisprudence § 536 (14th ed. 1918). This principle has not been limited to *in rem* or *quasi in rem* proceedings. Restatement of Judgments, *supra,* § 89, comment *d;* see *ICC* v. *Western N. Y. & P. R. Co.,* 82 F. 192, 194 (WD Pa. 1897). We apply that principle here in order to effectuate the public policies of the Act. "Courts of equity may, and fre-

quently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 552 (1937); see *Walling* v. *James V. Reuter, Inc.,* 321 U. S., at 674–675. We hold that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65 (d). Cf. *United States* v. *Hall,* 472 F. 2d 261, 266–267 (CA5 1972); *Rivera* v. *Lawton,* 35 F. 2d 823 (CA1 1929); *United States* v. *Dean Rubber Mfg. Co.,* 71 F. Supp. 96 (WD Mo. 1946); *United Gilpin Corp.* v. *Wilmore,* 100 Colo. 453, 68 P. 2d 34 (1937); 7 J. Moore, Federal Practice ¶ 65.13, p. 109 and n. 1 (2d ed. 1973).

Our holding in no way contravenes the policy underlying Rule 65 (d), of not having "order[s] or injunction[s] so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear,* 324 U. S., at 13; see *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832 (CA2 1930). The tie between the offending employer and the bona fide purchaser of the business, supplied by a Board finding of a continuing business enterprise, establishes the requisite relationship of dependence. Moreover, procedures were announced in *Perma Vinyl* which provide the necessary procedural safeguards. There will be no adjudication of liability against a bona fide successor "without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it." 164 N. L. R. B., at 969.

In this case, All American has no complaint that it was denied due notice and a fair hearing. It was made a party to the supplemental backpay specification proceeding, given notice of the hearing, and afforded full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act and its knowledge of the pendency of the unfair labor practice litigation at the time of purchase.

We now turn to the question whether the Board properly exercised its discretion in issuing the order against All American. The Board's decisional process in the *Perma Vinyl* line of cases has involved striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee. What we said of the Board's decisional process in another context is pertinent here:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Teamsters Local 449*, 353 U. S. 87, 96 (1957).

The Board's *Perma Vinyl* principles introduced into the balancing process an emphasis upon protection for the victimized employee:

> "Especially in need of help, it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands." 164 N. L. R. B., at 969.

The Board found support for this policy, and we think

properly, in the Court's observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 549 (1964):

> "Employees . . . ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

In *Wiley* a labor union sued under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, to compel a corporate employer to arbitrate under a collective-bargaining agreement. The agreement originally had been entered into with another corporation which had subsequently merged with Wiley for genuine business reasons. We held that the disappearance of the contracting corporation by merger did not necessarily terminate the rights of employees guaranteed by the agreement and that the successor employer could be compelled to arbitrate, so long as there was a "substantial continuity of identity in the business enterprise," evidenced there by the wholesale transfer of the predecessor's employees to the successor. 376 U. S., at 551.[5]

[5] We recognize that, unlike the situation in *Wiley* where state law provided some support for holding the successor by consolidation liable, see 376 U. S., at 547–548, the general rule of corporate liability is that, when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the

Later, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272 (1972), the Court extended the *Wiley* principle to a case where the original employer, a plant protection company, was displaced by a different company. The new company hired a majority of the employees of the old company. The Court held that the new company had been properly ordered to bargain with the bargaining representative which had been certified to the old company, since the bargaining unit remained essentially unchanged. It was also held, however, that the new employer was not bound by the collective-bargaining agreement agreed to by the union and the predecessor employer, inasmuch as § 8 (d) of the Act, as well as the legislative history of the labor laws, reflected a policy against compelling a party to agree to substantive contractual obligations. 406 U. S., at 281–

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obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. See 15 W. Fletcher, Cyclopedia Corporations §§ 7122–7123 (1961 rev. ed.); *Kloberdanz* v. *Joy Mfg. Co.*, 288 F. Supp. 817 (Colo. 1968). The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined. See 15 W. Fletcher, *supra*, § 7122, p. 196 (Supp. 1972); Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1062–1063 (1973). Successorship has been found "where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corp.*, 453 F. 2d 269 (CA6 1971); [and] where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (CA10 1962) . . . ." *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 306 (1972) (opinion of REHNQUIST, J.); see *id.*, at 291 (opinion of the Court). The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application. Cf. *NLRB* v. *Colten*, 105 F. 2d 179, 183 (CA6 1939).

284, 291. Similarly, the Court refused to bind the union, since it might have made bargaining concessions with the previous employer which it would not necessarily agree to in negotiations with the successor. *Id.*, at 288.

We in no way qualify the *Burns* holdings in concluding that the Board's order against All American strikes an equitable balance.[6] When a new employer, such as All American, has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities. Moreover, the Board's experience may reasonably lead it to believe that em-

[6] A purchasing company cannot be obligated to carry out under § 10 (c) every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see *NLRB* v. *Burns International Security Services, Inc., supra,* at 280 n. 5, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor or by any order tied to the continuance of the bargaining agent in the unit involved. *Id.*, at 280–281.

ployers intent on suppressing union activity may select for discharge those employees most actively engaged in union affairs, so that a failure to reinstate may result in a leadership vacuum in the bargaining unit. Cf. *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 193 (1941). Further, unlike *Burns,* where an important labor policy opposed saddling the successor employer with the obligations of the collective-bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability.

Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 of the Act, 29 U. S. C. § 157, and protection for the victimized employee—all important policies subserved by the National Labor Relations Act, see 29 U. S. C. § 141—are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." *Perma Vinyl Corp.,* 164 N. L. R. B., at 969. If the reinstated employee does not effectively perform, he may, of course, be discharged for cause. See 29 U. S. C. § 160 (c).[7]

[7] The only court of appeals panel which has considered the *Perma Vinyl* decision, other than the Fifth Circuit in enforcing the Board's order in that case, *United States Pipe & Foundry Co.* v. *NLRB,* 398 F. 2d 544, and the Ninth Circuit in the decision under review, 467 F. 2d 164, has expressed its approval. *UAW* v. *NLRB,* 442 F. 2d, at 1183 (Tuttle, J.). Commentators have generally concurred. See DuRoss, *supra,* n. 4; Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735 (1969); Comment, Successor Employer's Obligation to Remedy Unfair Labor Practices, 68

III

Golden State attacked in the Court of Appeals the provision of the Board's order directing that it and All American jointly or severally pay Baker a specified sum of net backpay. Golden State contends that, at most, it "should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of this wrongful termination until the date of sale of the bottling company by Golden State, January 31, 1968." Brief for Petitioners 60.[8] The Court of Appeals declined to consider this argument because Golden State had agreed orally and in the contract of sale to indemnify All American for any backpay paid Baker by All American and therefore was "liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement." 467 F. 2d, at 166. But Golden State's contractual obligation may be subject to contractual defenses and for that reason may not in fact be the equivalent of the liability imposed upon Golden State by the order. We shall therefore decide Golden State's challenge to the validity of the imposition of joint and several liability upon Golden State. We find no merit in the challenge.

The Board justified such provisions in *Perma Vinyl* in these words: "With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all

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Col. L. Rev. 1602 (1968); Comment, 42 N. Y. U. L. Rev. 1202 (1967); Comment, 47 N. C. L. Rev. 459 (1969); Comment, 41 Temp. L. Q. 156 (1967); Comment, 13 Vill. L. Rev. 232 (1967).

[8] Although the original order of the Board required Golden State to reinstate Baker, 147 N. L. R. B., at 412, the Board concedes that the sale to All American terminated Golden State's reinstatement obligation. See *NLRB* v. *New Madrid Mfg. Co.*, 215 F. 2d 908 (CA8 1954).

responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer." 164 N. L. R. B., at 970. In addition, joint and several liability will more fully insure that the employee is fully recompensed by protecting him, *e. g.*, against the insolvency of the successor. The possibility that the successor will unjustifiably delay reinstatement to the predecessor's prejudice can be met by a protective provision in the contract of sale. We cannot say that the Board has erred in thus "striking [the] balance to effectuate national labor policy . . . ." *NLRB* v. *Teamsters Local 449*, 353 U. S., at 96.[9]

IV

When Baker was discharged on August 16, 1963, he was Golden State's leading driver-salesman. On October 1, 1964, Golden State began converting its top driver-salesmen to distributors, or independent contractors, who realized net profits, after the deduction of their operating expenses, from the purchase of products from Golden State and the resale to customers. The Board found that Baker would have become a distributor on October 1, 1964, but for his discharge on August 16, 1963. The Board therefore computed Baker's gross backpay

[9] Golden State's reliance on *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965), is misplaced. In *Darlington*, it was held that an employer's liquidation of its entire business, even if motivated by antiunion animus, would not be an unfair labor practice. *Id.*, at 273–274. But Golden State committed an unfair labor practice over four years prior to the sale of the bottling business to All American, and in that circumstance, the sale could not terminate its continuing liability for backpay.

subsequent to October 1, 1964, on the basis of what he would have earned as a distributor after that date.

Petitioners argue that the change on October 1, 1964, from driver-salesman to distributor ended their liability to Baker on that date because distributors are "independent contractors" excluded from coverage of the Act by 29 U. S. C. § 152 (3). The Court of Appeals rejected that contention, stating:

> "However, it is undisputed that when Baker was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. NLRB v. Bell Aircraft Corp., 206 F. 2d 235, 236–237 (2d Cir. 1953)." 467 F. 2d, at 166.

We agree with the Court of Appeals and add only the observation that its conclusion is buttressed by the consideration that an order requiring reinstatement and backpay is aimed at "restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate . . . ." *NLRB* v. *J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U. S. 258, 263 (1969).[10] The Board treats net profits of the employee who goes into business on his own as interim earnings for the purpose of computing net backpay. *Mastro Plastics Corp.*, 136 N. L. R. B. 1342, 1350 (1962), enforced in part, *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170 (CA2 1965). In the effort to restore the economic status quo that would have

[10] It is apparent that had Golden State already reinstated Baker with backpay before the sale of its business, and thereby fully complied with the Board's order, All American would have had no more obligation to employ him in the continuing business than it had to employ any of Golden State's other employees. See n. 6, *supra*.

obtained but for Baker's wrongful discharge, it was also proper to compute what he would have earned after October 1, 1964, on the basis of his net profits as a distributor. Cf. *NLRB* v. *Rice Lake Creamery Co.*, 124 U. S. App. D. C. 355, 358, 365 F. 2d 888, 891 (1966); *NLRB* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402 (CA5 1967).

Affirmed.

FALK ET AL. *v.* BRENNAN, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–844. Argued October 11, 1973—Decided December 5, 1973

Respondent brought this action to enjoin petitioners (hereafter D & F), a fully integrated partnership managing apartment complexes for a fixed percentage of the gross rentals collected from each project, from minimum wage and other violations of the Fair Labor Standards Act. The District Court dismissed the complaint, adopting D & F's contentions that it does not have a $500,000 "annual gross volume of sales made or business done" and thus does not come within the term "enterprise engaged in commerce" as defined in § 3 (s) of the Act, and that it is not an employer, within the meaning of § 3 (d), of the maintenance personnel who are paid from the rentals received at the apartment complexes where they work. The Court of Appeals reversed, holding that D & F met the statutory definition of "employer" and that in determining whether the enterprise satisfies the dollar-volume limitation, it is the gross rentals (which exceed $500,000 annually) that D & F collects at all the apartment complexes that must be considered rather than the gross commissions that D & F receives from the apartment owners. *Held:*

1. D & F, whose managerial responsibilities at each of the buildings give it substantial control of the terms and conditions of the work of employees at those buildings, is an "employer" under the expansive definition of the term in § 3 (d) of the Act. P. 195.

2. D & F sells only its professional management services, and the gross rentals it collects as part of those services do not represent sales attributable to its enterprise. D & F's commissions are therefore the relevant measure of its gross sales made or business done for purposes of the dollar-volume limitation in § 3 (s) (1). Thus, though D & F is an "enterprise" under § 3 (r), *Brennan* v. *Arnheim & Neely, Inc.*, 410 U. S. 512, the Act does not apply to D & F as its commissions are below the § 3 (s) (1) limitation. Pp. 195–201.

Vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined, *post*, p. 202.

Herbert V. Kelly argued the cause for petitioners. With him on the brief were *Franklin O. Blechman* and *E. D. David.*

Andrew L. Frey argued the cause for respondent. With him on the brief were *Solicitor General Bork* and *Sylvia S. Ellison.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The Secretary of Labor initiated this action against the petitioners, partners in a real estate management company, for an injunction against future violations of various provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, and for back wages allegedly due to employees affected by past violations of the Act.[1] The petitioners' defense was that they are not "employers" [2] of the employees involved, and that their business is not a single "enterprise" that is subject to the Act's requirements. This latter contention brought together two separate arguments. First, the petitioners contended that their com-

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**Howard Lichtenstein* and *Marvin Dicker* filed a brief for the Realty Advisory Board on Labor Relations, Inc., as *amicus curiae* urging reversal.

[1] The complaint alleged violations of the minimum wage (29 U. S. C. § 206 (b)), overtime (29 U. S. C. § 207 (a)(2)), and recordkeeping (29 U. S. C. § 211 (c)) provisions of the Act.

[2] Section 3 (d), 29 U. S. C. § 203 (d), states that an " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."

bined activities do not constitute an "enterprise," as that term is defined in § 3 (r), 29 U. S. C. § 203 (r). Second, the petitioners argued, even if their business activities do amount to an "enterprise," they are not an "[e]nterprise engaged in commerce or in the production of goods for commerce," as that term is defined in § 3 (s), 29 U. S. C. § 203 (s), because they do not have an "annual gross volume of sales made or business done" of $500,000.[3]

Under the partnership name of Drucker & Falk (D & F), the petitioners render management services for the owners of a number of apartment complexes in the State of Virginia. Under its contracts with the apartment owners, D & F agrees to perform, on behalf of each owner and under his nominal supervision, virtually all management functions that are ordinarily required for the proper functioning of an apartment complex.[4] These contracts are for a stated term of not less than one year. Each party can terminate the arrangement by giving the other party 30 days' notice of his intent to do so. Neither D & F nor any of its partners hold any property interest in the buildings that D & F manages. D & F receives as compensation a fixed

[3] The dollar-volume limitation was $500,000 at all times relevant to this action. 29 U. S. C. § 203 (s)(1). On February 1, 1969, the dollar-volume limitation was reduced to $250,000.

[4] D & F performs all the functions required for leasing, maintaining, and operating the apartment buildings. These include advertising the availability of apartments for rent; signing, renewing, and canceling leases; collecting rents; instituting, prosecuting, and settling all legal proceedings for eviction, possession of the premises, and unpaid rent; making necessary repairs and alterations; negotiating contracts for essential utilities and other services; purchasing supplies; paying bills; preparing operating budgets for the property owners' review and approval; submitting periodic reports to the owners; and hiring and supervising all employees required for the operation and maintenance of the buildings and grounds.

percentage of the gross rentals collected from each project.[5]

The rentals collected by D & F are deposited in local bank accounts.[6] From these accounts it pays all expenses incurred in operating and maintaining the buildings. After deducting its compensation, as well as any other applicable expenses, D & F transmits payments to the various owners on a periodic basis. If disbursements for any apartment complex exceed its gross rental receipts, the owner is required under the contract to reimburse D & F.

The subject of the Secretary's complaint was the wages and hours of the maintenance personnel who work at each of the apartment complexes, the contention being that D & F is in violation of the minimum wage, overtime, and recordkeeping provisions of the Act with respect to these maintenance workers. These employees work under the supervision of D & F and are paid from the rentals received at the apartment complexes where they are employed. They are considered in the contracts between the owners and D & F as "employees of the project owners."

In the District Court, D & F contended that its management activities at the several apartment complexes do not constitute a single "enterprise," as that term is defined in § 3 (r) of the Act, 29 U. S. C. § 203 (r); that, even if its business is a single "enterprise," it does not have the $500,000 "annual gross volume of sales made or business done" required by § 3 (s)(1), 29 U. S. C. § 203 (s)(1), for coverage by the Act; and that it is not an "employer" of these maintenance workers, as that term

[5] The commission that D & F receives varies between 4% and 6%, depending on the particular arrangements with the building owner.

[6] The rents for all the buildings managed by D & F totaled over $7,700,000 in 1967 and over $8,600,000 in 1968.

is defined in § 3 (d), 29 U. S. C. § 203 (d). The District Court agreed with all three of these contentions and dismissed the complaint. The Court of Appeals reversed. It held that the management activities performed by D & F constitute a single "enterprise" for coverage purposes and that D & F meets the statutory definition of "employer" with respect to the maintenance workers. The appellate court also concluded that, in determining whether the enterprise satisifies the dollar-volume limitation, it is the gross rentals that D & F collects at all the apartment complexes that must be considered, rather than, as the District Court had held, the gross commissions that D & F receives from the apartment owners. Since there is no question that these gross rentals exceed $500,000 annually, the court held that D & F is subject to the Act and in violation thereof with respect to the maintenance workers.

We granted certiorari to review this judgment of the Court of Appeals.[7] Two days later, we held, in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U. S. 512 (1973), that a fully integrated real estate management company that directs management operations at several separately owned buildings was a single "enterprise" for purposes of the Act, thus confirming the holding of the Court of Appeals on that issue in the present case. But our decision in *Arnheim & Neely* did not reach the other two statutory questions raised by D & F. We accordingly

[7] Both the District Court and the Court of Appeals had this case before them twice. Initially, the District Court dismissed the complaint. The Court of Appeals reversed and remanded for further proceedings. *Shultz* v. *Falk*, 439 F. 2d 340. The petitioners sought certiorari, and we denied the writ. *Falk* v. *Hodgson*, 404 U. S. 827 (1971). On remand to the District Court, the petitioners resisted the imposition of judgment and particularly the awarding of prejudgment interest. The District Court rendered judgment against the petitioners and awarded prejudgment interest. The Court of Appeals affirmed, and the petitioners again sought certiorari.

limited the grant of certiorari to questions 2 and 3 presented by the petition:

> "(2) Under the Fair Labor Standards Act to be covered an enterprise must have an 'annual gross volume of sales made or business done' of $500,000. Is this figure to be measured by the gross rentals collected by the agent or by that agent's gross commissions?
>
> "(3) Are maintenance workers employed at the buildings managed by petitioners employees of the apartment owner or of the petitioners?" 410 U. S. 954.

I

As to question 3, the "employees" issue, it is clear that the maintenance workers are employees of the building owners. But we think that the Court of Appeals was unquestionably correct in holding that D & F is also an "employer" of the maintenance workers under § 3 (d) of the Act, which defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U. S. C. § 203 (d). Section 3 (e) defines "employee" to include "any individual employed by an employer." 29 U. S. C. § 203 (e). In view of the expansiveness of the Act's definition of "employer" and the extent of D & F's managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D & F is, under the statutory definition, an "employer" of the maintenance workers. We turn, therefore, to the other question embraced in the grant of certiorari.

II

In *Brennan* v. *Arnheim & Neely Inc., supra,* we held that the integrated operations of a real estate management company satisfied the definition of "enterprise"

under § 3 (r) of the Act. This holding was based upon the conclusion that the management activities met the three statutory tests of an "enterprise": related activities, unified operation or common control, and common business purpose. It is important to understand, however, that the "enterprise" the Court found in *Arnheim & Neely* consisted of the sale of management services by the respondent. The Court did not hold that the separate property interests of each apartment owner were to be considered part of the management enterprise of Arnheim & Neely. Indeed, § 3 (r) and the legislative history of the 1961 "enterprise amendments" to the Act strongly suggest that the use of common agents by independent entities is not sufficient to convert to a single "enterprise" what otherwise are independent businesses.[8] Thus, D & F's enterprise in the present

[8] Section 3 (r), 29 U. S. C. § 203 (r) provides, in pertinent part: "[A] retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact it occupies premises leased to it by a person who also leases premises to other retail or service establishments."

The Senate Report on the 1961 amendments to the Act included the following statements regarding this portion of § 3 (r):

"[T]he mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same 'enterprise.'" S. Rep. No. 145, 87th Cong., 1st Sess., 42.

case, as in *Arnheim & Neely,* consists of and is limited to its combined management activities at the various apartment complexes.

The Act imposes its requirements, not on every "enterprise," but only on an "enterprise engaged in commerce or in the production of goods for commerce." [9] One of the statutory elements of the latter term is the dollar-volume limitation, which in this case is $500,000 annually.[10] The bone of contention between the Secretary and D & F is whether this dollar-volume limitation is to be measured by the annual gross rentals collected by D & F as agent of the apartment owners, or by the gross commissions paid to D & F by the owners as compensation for its management services. Section 3 (s)(1), which prescribes the dollar-volume limitation, speaks of "an enterprise *whose* annual gross volume of sales made or business done is not less than $500,000." 29 U. S. C. § 203 (s)(1). (Emphasis added.) This statutory language requires that, after determining what the relevant enterprise is, we turn our attention to what *that enterprise* sells or to what business *it* does.

Any doubt about whether the rental of space is a "sale" for purposes of the Act was removed when Congress amended § 3 (s) in 1966 to provide that the dollar-volume limitation would henceforth be measured by "annual gross volume of sales made or *business done,*" 80 Stat. 831 (emphasis added). The Senate Report on the 1966 amendments makes clear that the added language was intended to dispel any uncertainty that revenue derived from services, rentals, or loans, even though perhaps not literally "sales," was nevertheless to be considered in

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[9] See, *e. g.,* § 6 (b) (29 U. S. C. § 206 (b)), § 7 (a) (29 U. S. C. § 207 (a)), and § 11 (c) (29 U. S. C. § 211 (c)).

[10] The petitioners' gross commissions amounted to slightly more than $434,000 and somewhat less than $463,000 in 1967 and 1968, respectively, the years involved in this litigation.

measuring the dollar-volume limitation of § 3 (s). The Report indicates that the amendment was intended to signify legislative approval of the result in *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F. 2d 857, which so interpreted § 3 (s) as it read before the addition of the "business done" language. As the Senate Report explained:

> "The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3 (s), will thus continue to include both the gross dollar volume of the sales . . . which it makes, as measured by the price paid by the purchaser for the property or services sold to him . . . , and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind." S. Rep. No. 1487, 89th Cong., 2d Sess., 7–8.

But, a determination that rentals are "sales made or business done" within the meaning of the Act does not begin to dispose of the issue before us. The question remains, under § 3 (s)(1), what enterprise made the sales or did the business.

The Secretary contends that the "sales made or business done" by D & F includes the gross rental income of apartments in the buildings that it manages. He argues that the fact that D & F does not own the buildings should not preclude attribution of the rentals to it. D & F argues that it sells only managerial services and thus that the rentals it collects on behalf of the owners are not "sales made or business done" by its enterprise. It contends, therefore, that its gross sales should be measured, not by the rentals it collects from the tenants, but rather by

the management fees that the owners pay it as compensation for its services—*i. e.*, its gross commissions.

The line between a seller of a product and a seller of a service is not always readily discernible, especially when one of the services relates to the sale of a product or, what amounts to the same thing for purposes of the Act, the rental of space. As an abstract proposition, the Secretary is undoubtedly correct in his position that ownership is not necessarily determinative in attributing "sales made or business done" for purposes of the statute. For example, a consignment seller's gross sales might properly be measured by his gross receipts from sales of the product, even though he did not actually hold title to the product that he sold. Realistically, such a seller is in the business of selling the product that is consigned to him, and he is functionally in a position no different from that of a seller who has purchased the product before resale. The only practical difference may be that the "cost of goods sold" element of the profit equation is expended before resale in the one case and after resale in the other.

In the present case, however, we are convinced that the enterprise of D & F is limited to the sale of its professional management services, and, accordingly, that the commissions it receives are the relevant measure of its gross sales made or business done for purposes of the dollar-volume limitation in § 3 (s)(1). D & F collects a number of rentals on behalf of the property owners. In nearly every case, these rentals are paid pursuant to lease agreements of significant duration. Some may predate D & F's management of the premises, and D & F may thus have had absolutely nothing to do with the "sales" underlying the periodic rentals it collects for the owner.[11]

[11] The record does not show what proportion of the rentals is attributable to leases predating D & F's managerial tenure at each

When a lease does expire and is not renewed by the tenant, D & F undertakes to find a new tenant for the owner and serves as agent for the owner in the negotiation and execution of a new lease. With respect to such a lease, a colorable argument can be made for attribution of the rentals to D & F, since its negotiation of a new lease increases, or at least maintains, the volume of rents collected and thus also its percentage compensation. But such an argument does not withstand any but the most superficial analysis.

In the typical commodity sale the seller's remuneration is a function of the gross margin between the cost of the product to him and the resale price. At first blush, the determination of D & F's compensation as a percentage of the gross rentals seems somewhat akin to the margin of the typical seller. Upon reflection, however, a critical difference appears: when a lease is negotiated by D & F, its remuneration is calculated, not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders significant and substantial management services beyond its earlier service in negotiating the lease. It is clear, therefore, that the business of the D & F enterprise is not the sale of a product (the rental of realty) but a sale of professional management services. This conclusion follows logically from our holding in *Arnheim & Neely* that the relevant enterprise for purposes of deciding whether a real estate management company is covered by the Act, consists of its "aggregate manage-

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building. When the underlying lease does predate D & F's contract with the owner, however, the total absence of any participation by D & F in the lease transaction, of which the periodic rentals are merely the proceeds, belies any attempt to attribute these rentals to D & F as an index of its gross "sales made or business done."

ment activities" at the various buildings that it supervises. 410 U. S., at 519. In this regard, the commissions received by D & F differ even from the compensation received by the typical broker of realty or stock, whose primary undertaking is to negotiate a sale of the principal's property and whose compensation is calculated on the proceeds of that sale.

On these facts, we think the conclusion is inescapable that D & F vends only its professional management services, and that the gross rentals it collects as part of these services do not represent sales attributable to its enterprise. It follows that the correct measure of the "gross volume of sales made or business done" by D & F is the gross commissions it receives from the apartment owners as compensation for the management services it renders.[12] Since these commissions did not reach $500,000 annually during the period involved in this litigation, it follows that D & F was not an "[e]nterprise engaged in commerce or in the production of goods for commerce," within the meaning of the Act.

[12] Part II of the dissent suggests that the "annual gross volume of sales made or business done" of D & F's enterprise "must include amounts paid by the building owner to cover operation and maintenance costs, plus the amount paid as commissions." *Post*, at 211. The dissent's rationale is that D & F was in effect paying the operation and maintenance costs itself and then being reimbursed by the apartment owners. Such an argument was not made by the Secretary. Even if such a payment and reimbursement arrangement would cause the operation and maintenance costs to be included in measuring "annual gross volume of sales made or business done" (which we do not decide), it is clear that such an arrangement did not exist between D & F and the building owners. The rentals were collected by D & F as the agent for the owners and were placed in bank accounts on their behalf. D & F paid the operation and maintenance costs of the buildings from the owners' funds pursuant to its agreement with, and on the authority of, the owners.

The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.[13]

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the Court's holding that petitioners are "employers" of the maintenance workers who service the apartment buildings managed by D & F.

I dissent, however, from the holding that, for the purposes of § 3 (s)(1), "the enterprise of D & F is limited to the sale of its professional management services," and that those services must be measured by D & F's commissions. The record in this case leaves no doubt whatever that D & F's enterprise activities resulted in both the sale of professional management services *and* rental space. While the Court acknowledges that sales of rental space are "sales made or business done" within the meaning of § 3 (s)(1), *ante*, at 197, it nevertheless decides that rental sales should not be attributed to D & F because, "when a lease is negotiated by D & F, its remuneration is calculated not from the proceeds derived from that lease, but only from the rentals collected during its managerial tenure, during which period it renders

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[13] A footnote in the Secretary's brief states that, in addition to its management services, D & F also sells insurance and real estate. These operations might bring D & F's "annual gross volume of sales made or business done" to more than $500,000 for the years in question if the insurance, real estate sales, and real estate management operations of D & F's business are "related activities" for enterprise coverage purposes under § 3 (r) of the Act. We leave for the District Court the consideration of the Secretary's contention.

significant and substantial management services beyond its earlier service in negotiating the lease." *Ante*, at 200.

To be sure, D & F's remuneration for renting an apartment may not be subject to precise calculation at the time of the sale: compensation for the sale is derived from D & F's percentage of monthly rent receipts, which includes D & F's compensation for building operation and maintenance; and conceivably the building owner might terminate D & F's management contract before the tenant makes all the monthly payments required under the lease, thus reducing D & F's compensation for the sale of the rental space. It is also true that after selling the rental space, D & F performs other significant and substantial management services. But these rather unsurprising observations hardly supply a basis for the Court's conclusion that: "It is clear, therefore, that the business of the D & F enterprise is not the sale of a product (the rental of realty) but a sale of professional management services," and that such services must be measured by commissions. Neither the facts in this case, nor the plain words of § 3 (s)(1), and the uncommonly unambiguous legislative history of that section support the Court's conclusion that Congress meant to measure one particular enterprise activity to the exclusion of others.

I

Section 3 (s)(1) limits coverage under the Act to those enterprises "whose annual gross volume of sales made or business done is not less than $500,000 . . . ." [1] 29 U. S. C.

[1] Section 3 (r) of the Act, 29 U. S. C. § 203 (r), defines "enterprise" to mean:

"the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment

§ 203 (s)(1). The term "sales" employed in § 3 (s)(1) is defined with specificity in § 3 (k) of the Act, 29 U. S. C. § 203 (k), to mean "*any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" (emphasis added). Those are simple and entirely unambiguous words that do not even remotely imply that only *some* "sales made or business done" should be measured. Clearly, § 3 (s)(1), in terms, embraces the gross volume of apartment leases sold by D & F, as well as the professional management services sold by D & F to building owners.[2]

In addition, even were the wording of § 3 (s)(1) less clear, "[t]his is not a case where perforce we must attempt to resolve a controversy as to the true meaning of equivocal statutory language unaided by any reliable extrinsic guide to legislative intention," *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 293 (1959). Senate and House Reports concerning the 1961 and 1966 "enterprise amendments" to the Act show explicitly that Congress

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operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor . . . ."

The dollar-volume test of § 3 (s)(1) of the Act, 29 U. S. C. § 203 (s)(1), limits coverage during the period February 1, 1967, through January 31, 1969, to those enterprises "whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . ." On February 1, 1969, the dollar-volume test was reduced to $250,000. It is not disputed that each year since February 1, 1969, petitioners have met the dollar-volume requirement of the Act.

[2] In addition to the Court of Appeals below, the Courts of Appeals for the Fifth and Tenth Circuits have held that the leasing of rental property constitutes a "sale" within the meaning of the enterprise provisions of the Act. See *Wirtz* v. *Savannah Bank & Trust Co.*, 362 F. 2d 857 (CA5 1966); *Wirtz* v. *First National Bank & Trust Co.*, 365 F. 2d 641 (CA10 1966).

intended enterprise activities to be measured by *all* "sales made or business done." [3]

Prior to 1961, the protections of the Act were extended only to employees who were themselves "engaged in commerce or in the production of goods for commerce," §§ 6 (a), 7 (a), 29 U. S. C. §§ 206 (a), 207 (a). With the enterprise amendments of 1961, Congress substantially broadened the coverage of the Act to include all employees "employed in an enterprise engaged in commerce," 75 Stat. 67, 69. But not every enterprise meeting the statutory definition in § 3 (r) of the Act was brought within the Act's coverage. Section 3 (s)(1) prescribed a dollar-volume test that limited the Act's coverage to those enterprises that had an "annual gross volume of sales of . . . not less than $1,000,000," *id.*, at 66. The Senate and House Reports show that the dollar-volume test was adopted to establish an economic standard that predicates coverage of the Act upon the size of the enterprise and its impact upon commerce. See H. R. Rep. No. 75, 87th Cong., 1st Sess., 3, 7, 13 (1961); S. Rep. No. 145, 87th Cong., 1st Sess., 6–7, 31 (1961); see also the Staff Report of Labor Subcommittee offered on the floor by Senator McNamara, 107 Cong. Rec. 5840–5842 (1961).

To insure that the term "sales" would not be given a narrow or technical interpretation that might exclude some enterprises that have the requisite dollar volume

[3] A continuance of the judicial practice of liberal interpretation of the Act was clearly contemplated by Congress:

"In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a liberal interpretation, consonant with the definitions, with the purpose of the Act, and with its character as remedial and humanitarian legislation." H. R. Rep. No. 1366, 89th Cong., 2d Sess., 10 (accompanying the 1966 amendments to the Act).

of business, but that do not make typical commodity sales,[4] Congress amended the enterprise provisions of the Act in 1966, 80 Stat. 831, by substituting the wording "annual gross volume of sales made *or business done*" (emphasis added), for "annual gross volume of sales," the term employed in the 1961 amendments. The Senate Report fully explains Congress' reasons for changing the terminology:

> "This test . . . is intended to *measure the size of an enterprise* for purposes of enterprise coverage *in terms* of the annual gross volume in dollars (exclusive of specified taxes) *of the business transactions which result from activities of the enterprise,* regardless of whether such transactions are 'sales' in a technical sense.
>
> ". . . The addition of the term 'business done' to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3 (s), will thus continue [under the 1966 Amendments] to include both the gross dollar volume of the sales (as defined in sec. 3 (k)) which it makes, as measured by the price paid by the purchaser for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other

[4] Questions concerning the scope of the term "sales" in the dollar-volume provision of the 1961 enterprise amendments had arisen in suits brought by the Secretary of Labor to enforce the Act. For example, in *Wirtz* v. *Savannah Bank & Trust Co., supra,* the defendant bank contended "that the term 'sales' must be given a 'literal interpretation' and . . . would not include rental receipts, interest on loans and securities or income from services." 362 F. 2d, at 862–863 (footnote omitted).

> business activity in which the enterprise engages which can be similarly measured on a dollar basis. *This would include,* for example, *such activity by an enterprise as* making loans or *renting or leasing property of any kind.* S. Rep. No. 1487, 89th Cong., 2d Sess., 7–8 (1966). (Emphasis added.)

Congressional intent, with respect to the dollar-volume test in § 3 (s)(1), could not be more clear: "the business transactions which result from activities of the enterprise" are to be measured. No transactions are excepted from measurement. Nothing in the legislative history suggests that when remuneration for essentially different transactions is in some way commingled, or when an enterprise engages in closely related activities, only those transactions constituting the essence of enterprise should be measured. For the purposes of § 3 (s)(1), the only relevant inquiry is what activities the enterprise engages in, and what sales or business transactions result from those activities. Measurement of the dollar volume of those transactions indicates the size of the enterprise and its impact upon commerce.

Turning to the facts in this case, it is clear from the stipulated record in the District Court that D & F engages in essentially two distinct, though related, activities. First, D & F rents apartments to the public. In this connection, D & F employs a staff of sales personnel who advertise available apartments, interview prospective tenants, and negotiate and renew leases on behalf of the apartment-building owner. Second, D & F operates and maintains apartment buildings. By contract with the building owner, D & F agrees to collect rent; initiate, prosecute, and settle all legal proceedings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for utilities and other necessary services; purchase supplies;

pay all bills, including mortgage payments; prepare an operating budget for the building owner's review and approval; submit periodic reports to the owner; and hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises. Thus, D & F performs both brokerage and management activities. Indeed, the first article of every contract entered into by D & F and a building owner states: "Owners hereby employ and appoint [D & F] as the sole and exclusive *renting and management agent* . . ." (emphasis added).

The business transactions resulting from these activities are quite distinct and subject to separate measurement. D & F's *brokerage* activities result in the sale of rental space to the public. D & F's *management* activities result in a business transaction between D & F and the building owner, *i. e.*, D & F's sale of professional management services.

The Court, however, focuses upon D & F's management activities and measures only the resulting transaction between D & F and the building owners. To be sure, these transactions have an impact upon commerce and must, therefore, be measured under the dollar-volume test. As a result of these transactions, D & F hires and supervises more than 100 persons who perform all the functions necessary for the efficient operation and maintenance of apartment buildings, and thus engages in activities which clearly induce a flow of men, money, and materials across state lines. But, as significant as this impact upon commerce may be, it pales by comparison to the impact caused by D & F's brokerage activities. To sell apartments, D & F employs a special staff of personnel whose duties include developing marketing strategies, placing advertisements in various media, interviewing prospective tenants, and negotiating

leases. These activities generate a flow of millions of dollars per year in gross rent receipts, with consequent impacts upon commerce too numerous and obvious to trace here. The significant impact of D & F's brokerage activities upon commerce is not diminished by the fact that the apartment buildings are owned by others. It is D & F's brokerage activities—not the building owners'—that result in the sale of rental space. In this respect, D & F, as a broker selling rental space owned by others, is indistinguishable from the salesman of consignment goods, whose "sales made or business done," the Court concedes, *ante,* at 199, must be measured by the gross receipts from sales of the product.

Ignoring D & F's brokerage activities and their resulting transactions, therefore, not only contradicts Congress' clearly expressed intention that transactions resulting from *any* activity of the enterprise be measured, but also undermines the effectiveness of the dollar-volume test as a measure of an enterprise's size and impact upon commerce.[5] "Where both the words of a statute and its legislative history clearly indicate the purpose of Congress, it should be respected," *Schwegmann*

[5] An enterprise's dollar volume of "sales made or business done" is measured by its "gross receipts," see part II, *infra.* The record indicates that D & F collected gross rent receipts of $7,752,600.86 in 1967 and $8,607,086.04 in 1968. That portion of the gross rent receipts attributable to D & F's sales of rental space constitutes the proper dollar-volume measure of D & F's brokerage activities. As discussed in part II, *infra,* D & F's "gross receipts" for its management activities must be measured by the commissions D & F receives for such services plus any reimbursements D & F receives for the cost of men and materials. Since D & F is paid a single commission for both its brokerage and management activities, that portion representing compensation for its sale of rental space must be subtracted from the total commission in order accurately to measure that portion of the commission attributable to its professional management services.

Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384, 402 (1951) (Frankfurter, J., dissenting).

II

Even proceeding on the Court's erroneous basic premise, however, D & F's sales of professional management services exceed $500,000 when computed, as Congress required, under the specific regulations promulgated by the Wage and Hour Division of the Department of Labor to effectuate § 3 (s)(1).[6] As a guide to making computations under § 3 (s)(1), Congress instructed that:

> "The method of calculating the requisite dollar volume of sales or business [for enterprise coverage purposes] will be the same as is now followed under the law with respect to calculating the annual dollar volume of sales in retail and service establishments, and in laundries under the exemptions provided in section 13 (a)(2), (3), (4), and (13) of the act. The procedure for making the calculation is set forth in the Department's Interpretative Bulletin [pertaining to retailers of goods and services]. As it is there stated, the 'annual dollar volume of sales' consists of the *gross receipts from all types of sales* during a 12-month period." S. Rep. No. 145, 87th Cong., 1st Sess., 38 (1961). (Emphasis added.)

This "gross receipts" method of computation is presently embodied in regulations which state: "The annual gross dollar volume of sales made or business done of an enterprise or establishment consists of the *gross receipts from all of its sales or its volume of business done* during a 12-

[6] Section 602 of Pub. L. 89-601, 80 Stat. 844, provides that the Secretary of Labor is "authorized to promulgate necessary rules, regulations, or orders with regard to the [1966 enterprise] amendments made by this Act."

month period," 29 CFR § 779.265. (Emphasis added.) See also 29 CFR §§ 779.259, 779.266–779.269.

Gross receipts from "sales" of professional services are not necessarily limited to commissions. True, if the "sale" is only of the personal labor of the seller, commissions may well be the sole measure of "sales made or business done" because commissions are the seller's only gross receipts. And where, in addition to his own labor, the seller of professional services provides, for a commission, personnel and materials as an integral part of the professional services rendered, the commission still constitutes the gross receipts for the sale of services. If, on the other hand, the purchaser of the professional services reimburses the seller for the costs of men and material and also pays a commission, plainly "gross receipts" under the statute and regulation are the reimbursement plus the commission.

D & F was compensated for its professional management services on a cost-plus-commission basis. It employed maintenance workers and purchased materials necessary for the operation and maintenance of the apartment buildings. By contract, the building owner agreed to reimburse D & F for these operation and maintenance costs,[7] and, in addition, to pay D & F a commission.[8] Thus, D & F's gross receipts must include amounts paid by the building owner to cover operation and maintenance costs, plus the amount paid as commissions.

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[7] The apartment building owners never actually sent funds to D & F to cover its costs and commissions. Rather, these sums were deducted by D & F from the total receipts it collected from the tenants of each apartment building.

[8] D & F's commissions are either 4% or 6% of gross rent receipts, depending upon the extent of the services it agrees to render.

FOLEY ET AL. *v.* BLAIR & CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72–1154. Argued November 12, 1973—
Decided December 5, 1973

Respondent securities broker was adjudged an involuntary bankrupt for having committed the fifth act of bankruptcy under § 3a (5) of the Bankruptcy Act. This adjudication was reversed by the Court of Appeals, but subsequently the bankruptcy court, on a petition by the broker which had been filed shortly after the adjudication, confirmed the broker's proposed arrangement with creditors under Chapter XI of the Act. *Held:* Where the issue of whether the confirmation of the Chapter XI arrangement renders the case moot because the petitioners no longer have a monetary stake in resolving whether the fifth act of bankruptcy had been committed, was briefed and argued before this Court, but because of the sequence of events was necessarily not treated in the Court of Appeals' opinion, the Court of Appeals should have the opportunity to consider such issue in the first instance, and in doing so, it should consider the effect of § 64a (1) of the Act providing that "one reasonable attorney's fee" for services rendered to petitioning creditors in involuntary bankruptcy cases shall be treated as a priority debt.

471 F. 2d 178, vacated and remanded.

Leo H. Raines argued the cause and filed a brief for petitioners.

Harvey R. Miller argued the cause for respondents. With him on the brief were *Charles Seligson, Michael L. Cook,* and *Donald J. Zoeller.*

PER CURIAM.

Blair & Co., Inc., was a member of the New York Stock Exchange, engaged in the general brokerage and commission business. In the early summer of 1970, as the result of operating losses and a shrinkage of capital,

Blair began a program of self-liquidation, which involved the transfer of customer accounts to other broker-dealers and the delivery of securities to customers so requesting. Blair apparently believed that its resources were sufficient to allow it to discharge its obligations to all customers and general creditors through this program. In September 1970, however, Blair concluded that successful implementation of this program might require the assistance of a Special Trust Fund which the New York Stock Exchange had established in 1964 to avoid bankruptcy of member firms.[1]

Consequently, on September 21, 1970, Blair entered into an agreement with the New York Stock Exchange, whereby the trustees of the special fund would make loans and guarantees to protect Blair's customers against loss. The agreement provided that the first such loan, guarantee, or advance by the fund would give the New York Stock Exchange the power to appoint a Liquidator of its own choosing to manage Blair's affairs. The powers of the Liquidator were set forth in the agreement.[2]

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[1] The Special Trust Fund is authorized by the Constitution of the New York Stock Exchange, Art. XIX, § 1.

[2] Paragraph VIII of the agreement provided:

"Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of the Corporation for the purpose of liquidating the business of the Corporation and shall proceed as follows in connection with the liquidation:

"i.) he shall promptly take such steps as he may deem practicable to reduce the Corporation's operating expenses and to dispose of the Corporation's salable assets;

"ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of the Corporation;

"iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of the Corporation;

On September 25, 1970, the trustees made an initial advance of $1,000, which triggered the appointment of respondent Patrick E. Scorese as Liquidator. Any plans for further advances or loans were terminated four days later, however, when the petitioners, holders of subordinated debentures of Blair, filed an involuntary petition in bankruptcy against Blair in the United States District Court for the Southern District of New York. *Inter alia*, the petition alleged that the appointment of the Liquidator constituted an act of bankruptcy under § 3a (5) of the Bankruptcy Act, 11 U. S. C. § 21 (a)(5). That section makes it an act of bankruptcy if any person

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

Concluding that Blair's consent to the appointment of the Liquidator in fact constituted this fifth act of bankruptcy, the Referee adjudicated Blair an involuntary bankrupt. The District Court denied a petition to review his order. On appeal, however, a divided panel of the Court of Appeals for the Second Circuit reversed, reasoning that the Liquidator was not a "receiver or

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"iv.) he shall pay any claim against the Corporation considered by him to be a valid claim of any customer of the Corporation;

"v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of the Corporation.

"It is agreed that consistent with the duty of the Liquidator to effect a fair and orderly liquidation of the business of the Corporation to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice."

On the same date that this agreement was signed, Blair executed a second instrument that more specifically delineated the powers of the Liquidator, who was described as "the true and lawful attorney and agent of and for the Corporation [Blair]."

trustee" within the statutory definition. 471 F. 2d 178. We granted the writ of certiorari, 411 U. S. 930, in order to resolve this issue of seeming importance in the administration of the Bankruptcy Act, and oral argument was heard on November 12, 1973.

The respondents have suggested, however, that we should not decide the merits of the controversy, because the present circumstances of Blair & Co. render the case moot. The suggestion is premised on a series of events following the filing of the original involuntary petition. On April 15, 1971, two days after the Referee had granted the petitioners' motion for summary judgment on the issue of whether Blair had committed the fifth act of bankruptcy, Blair filed a petition for relief under Chapter XI of the Bankruptcy Act, pursuant to § 321 of the Act, 11 U. S. C. § 721.[3] On May 18, 1971, the Referee entered an order pursuant to § 325 of the Act, 11 U. S. C. § 725, staying ordinary bankruptcy proceedings under Chapters I–VII pending the determination of the Chapter XI petition.

On May 26, 1971, Blair filed with the District Court its proposed arrangement with its creditors under Chapter XI. On September 27, 1971, the bankruptcy court found that the proposed arrangement had been accepted in writing by the requisite majority in number and amount of Blair's creditors, in accordance with §§ 336 (4) and 362 of the Act, 11 U. S. C. §§ 736 (4), 762.[4] Shortly thereafter on October 4, 1971, the petitioners moved in the District Court to dismiss the Chapter XI proceedings. This motion was not acted upon until February 16, 1973, after the Court of Appeals had reversed the adjudication of Blair as an involuntary bankrupt; on that date,

[3] The actual order adjudging Blair a bankrupt was not issued until April 27, 1971.

[4] The September 27 finding was an oral one, made in open court. Written findings to the same effect were filed on December 27, 1971.

the motion was denied. On June 12, 1973, the District Court denied a petition for review of that order. On October 2, 1973, while the present case was awaiting argument in this Court, the bankruptcy court entered an order confirming the arrangement proposed by Blair under Chapter XI. Apparently, no appeal was taken from the order of confirmation.

In light of the confirmation of the Chapter XI arrangement, the respondents suggest that this case no longer presents a live controversy. They rely upon § 371 of the Act, 11 U. S. C. § 771, which provides that confirmation of an arrangement "shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement," and argue that the petitioners thus no longer have any monetary stake in resolution of the controversy over whether the fifth act of bankruptcy was committed. See generally 9 W. Collier, Bankruptcy ¶¶ 9.32, 9.33 (14th ed. 1972). The respondents also argue that the original adjudication of bankruptcy is irrelevant to the present situation, since § 322 of the Act, 11 U. S. C. § 722, does not make the pendency of bankruptcy proceedings a prerequisite to the filing of a petition for relief under Chapter XI.

While the issue of mootness was briefed and argued before this Court, it was not treated in the opinion of the Court of Appeals, no doubt because the final confirmation order was not entered by the District Court until well after the appellate court had issued its judgment. Under these circumstances, we think it appropriate that the Court of Appeals have the opportunity to consider the mootness issue in the first instance. In reviewing the question of mootness, the Court of Appeals should consider the effect of § 64a (1) of the Act, 11 U. S. C. § 104 (a)(1). *Inter alia*, that section provides that "one reasonable attorney's fee" for the services rendered to

petitioning creditors in involuntary cases shall be treated as a priority debt in bankruptcy proceedings, payable out of the estate in advance of distribution of any dividends to creditors. Section 64 is made applicable to § 321 Chapter XI proceedings by § 302 of the Act, 11 U. S. C. § 702, and thus might allow the treatment of at least some of the petitioners' counsel fees as a priority expense. See 8 W. Collier, Bankruptcy ¶ 5.33 [3.1] and n. 25 (14th ed. 1972); see also *Reading Co.* v. *Brown*, 391 U. S. 471, 475.[5]

For the reasons stated above, we vacate the judgment of the Court of Appeals, and remand the case to that court to consider whether it has now become moot.

It is so ordered.

[5] While the effect of § 64a (1) upon the issue of mootness was discussed at oral argument, it was not the subject of briefing by either of the parties.

UNITED STATES *v.* ROBINSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-936. Argued October 9, 1973—Decided December 11, 1973

Having, as a result of a previous check of respondent's operator's permit, probable cause to arrest respondent for driving while his license was revoked, a police officer made a full-custody arrest of respondent for such offense. In accordance with prescribed procedures, the officer made a search of respondent's person, in the course of which he found in a coat pocket a cigarette package containing heroin. The heroin was admitted into evidence at the District Court trial, which resulted in respondent's conviction for a drug offense. The Court of Appeals reversed on the ground that the heroin had been obtained as a result of a search in violation of the Fourth Amendment. *Held:* In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment. Pp. 224–237.

(a) A search incident to a valid arrest is not limited to a frisk of the suspect's outer clothing and removal of such weapons as the arresting officer may, as a result of such frisk, reasonably believe and ascertain that the suspect has in his possession, and the absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the standards applicable to such a search. *Terry* v. *Ohio,* 392 U. S. 1, distinguished. Pp. 227–229; 234–235.

(b) A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment and a search incident to the arrest requires no additional justification, such as the probability in a particular arrest situation that weapons or evidence would in fact be found upon the suspect's person; and whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest need not be litigated in each case. P. 235.

(c) Since the custodial arrest here gave rise to the authority

to search, it is immaterial that the arresting officer did not fear the respondent or suspect that he was armed. Pp. 236–237.

153 U. S. App. D. C. 114, 471 F. 2d 1082, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 237. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 238.

Allan A. Tuttle argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Deputy Solicitor General Lacovara,* and *Jerome M. Feit.*

Joseph V. Gartlan, Jr., argued the cause for respondent. With him on the brief was *Dorothy Sellers.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robinson was convicted in United States District Court for the District of Columbia of the possession and facilitation of concealment of heroin in violation of 26 U. S. C. § 4704 (a) (1964 ed.), and 21 U. S. C. § 174 (1964 ed.). He was sentenced to concurrent terms of imprisonment for these offenses. On his appeal to the Court of Appeals for the District of Columbia Cir-

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *William E. James,* Assistant Attorney General, and *Robert R. Granucci* and *Sanford Svetcov,* Deputy Attorneys General, for the State of California; by *William J. Scott,* Attorney General, and *James B. Zagel* and *Jayne A. Carr,* Assistant Attorneys General, for the State of Illinois; and by *Fred E. Inbau, Alan S. Ganz, Frank Carrington, Glen R. Murphy, Wayne W. Schmidt, Geoffrey M. Alprin,* and *Scott R. Schoenfeld* for Americans for Effective Law Enforcement, Inc., et al.

Melvin L. Wulf and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

cuit, that court first remanded the case to the District Court for an evidentiary hearing concerning the scope of the search of respondent's person which had occurred at the time of his arrest. 145 U. S. App. D. C. 46, 447 F. 2d 1215 (1971). The District Court made findings of fact and conclusions of law adverse to respondent, and he again appealed. This time the Court of Appeals en banc reversed the judgment of conviction, holding that the heroin introduced in evidence against respondent had been obtained as a result of a search which violated the Fourth Amendment to the United States Constitution. 153 U. S. App. D. C. 114, 471 F. 2d 1082 (1972). We granted certiorari, 410 U. S. 982 (1973), and set the case for argument together with *Gustafson* v. *Florida*, No. 71–1669, *post*, p. 260, also decided today.

On April 23, 1968, at approximately 11 p. m., Officer Richard Jenks, a 15-year veteran of the District of Columbia Metropolitan Police Department, observed the respondent driving a 1965 Cadillac near the intersection of 8th and C Streets, N. E., in the District of Columbia. Jenks, as a result of previous investigation following a check of respondent's operator's permit four days earlier, determined there was reason to believe that respondent was operating a motor vehicle after the revocation of his operator's permit. This is an offense defined by statute in the District of Columbia which carries a mandatory minimum jail term, a mandatory minimum fine, or both. D. C. Code Ann. § 40–302 (d) (1967).

Jenks signaled respondent to stop the automobile, which respondent did, and all three of the occupants emerged from the car. At that point Jenks informed respondent that he was under arrest for "operating after revocation and obtaining a permit by misrepresentation." It was assumed by the Court of Appeals, and is conceded by the respondent here, that Jenks had

probable cause to arrest respondent, and that he effected a full-custody arrest.[1]

In accordance with procedures prescribed in police department instructions,[2] Jenks then began to search

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[1] The Court of Appeals noted that there was a difference in the presentation of the facts in the various proceedings that were conducted in the District Court. Counsel for respondent on appeal stressed that respondent had a record of two prior narcotics convictions, and suggested that Officer Jenks may have been aware of that record through his investigation of criminal records, while Jenks was checking out the discrepancies in the birthdates on the operator's permit and on the Selective Service card that had been given to him for examination when he had confronted the respondent on the previous occasion. Respondent argued below that Jenks may have used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had Jenks sought a warrant. The Court of Appeals found that Jenks had denied he had any such motive, and for the purposes of its opinion accepted the Government's version of that factual question, since even accepting that version it still found the search involved to be unconstitutional. 153 U. S. App. D. C. 114, 120 n. 3, 471 F. 2d 1082, 1088 n. 3. We think it is sufficient for purposes of our decision that respondent was lawfully arrested for an offense, and that Jenks' placing him in custody following that arrest was not a departure from established police department practice. See n. 2, *infra*. We leave for another day questions which would arise on facts different from these.

[2] The Government introduced testimony at the evidentiary hearing upon the original remand by the Court of Appeals as to certain standard operating procedures of the Metropolitan Police Department. Sergeant Dennis C. Donaldson, a Metropolitan Police Department Training Division instructor, testified that when a police officer makes "a full custody arrest," which he defined as one where an officer "would arrest a subject and subsequently transport him to a police facility for booking," the officer is trained to make a full "field tvpe search":

"Q. Would you describe the physical acts the officer is instructed to perform with respect to this field search in a full custody arrest situation?

"A. (Sgt. Donaldson). Basically, it is a thorough search of the

respondent. He explained at a subsequent hearing that he was "face-to-face" with the respondent, and "placed [his] hands on [the respondent], my right-hand to his

individual. We would expect in a field search that the officer completely search the individual and inspect areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes. Those are the areas we would ask a complete thorough search of.

"Q. What are the instructions in a field type search situation when an officer feels something on the outside of the garment?

"A. If it is a full custody arrest and he is conducting a field search, we expect him to remove anything and examine it to determine exactly what it is.

"THE COURT: That is a full custody arrest. What is the last part of it?

"THE WITNESS: In conducting a field search, which is done any time there is a full custody arrest, we expect the officer to examine anything he might find on the subject.

"THE COURT: Would he do the same thing in a pat-down search?

"THE WITNESS: If he could determine in his pat-down or frisk by squeezing that it was not, in fact, a weapon that could be used against him, then we don't instruct him to go further.

"THE COURT: But in a field search, even though he may feel something that he believes is not a weapon, is he instructed to take it out?

"THE WITNESS: Yes, sir."

Sergeant Donaldson testified that officers are instructed to examine the "contents of all of the pockets" of the arrestee in the course of the field search. It was stated that these standard operating procedures were initiated by the police department "[p]rimarily, for [the officer's] own safety and, secondly, for the safety of the individual he has placed under arrest and, thirdly, to search for evidence of the crime." While the officer is instructed to make a full field search of the person of the individual he arrests, he is instructed, and police department regulations provide, that in the case of a full-custody arrest for driving after revocation, "areas beyond [the arrestee's] immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation." Those regulations also provide that in the case

left breast like this (demonstrating) and proceeded to pat him down thus [with the right hand]." During this patdown, Jenks felt an object in the left breast pocket of the heavy coat respondent was wearing, but testified that he "couldn't tell what it was" and also that he "couldn't actually tell the size of it." Jenks then reached into the pocket and pulled out the object, which turned out to be a "crumpled up cigarette package." Jenks testified that at this point he still did not know what was in the package:

> "As I felt the package I could feel objects in the package but I couldn't tell what they were. . . . I knew they weren't cigarettes."

The officer then opened the cigarette pack and found 14 gelatin capsules of white powder which he thought to be, and which later analysis proved to be, heroin. Jenks then continued his search of respondent to completion, feeling around his waist and trouser legs, and examining the remaining pockets. The heroin seized from the respondent was admitted into evidence at the trial which resulted in his conviction in the District Court.

The opinion for the plurality judges of the Court of Appeals, written by Judge Wright, the concurring opinion of Chief Judge Bazelon, and the dissenting opinion of Judge Wilkey, concurred in by three judges, gave careful and comprehensive treatment to the authority of a police officer to search the person of one

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of some traffic offenses, including the crime of operating a motor vehicle after revocation of an operator's permit, the officer shall make a summary arrest of the violator and take the violator, in custody, to the station house for booking. D. C. Metropolitan Police Department General Order No. 3, series 1959 (Apr. 24, 1959).

Such operating procedures are not, of course, determinative of the constitutional issues presented by this case.

who has been validly arrested and taken into custody. We conclude that the search conducted by Jenks in this case did not offend the limits imposed by the Fourth Amendment, and we therefore reverse the judgment of the Court of Appeals.

I

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

Examination of this Court's decisions shows that these two propositions have been treated quite differently. The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case. The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched.

Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks* v. *United States*, 232 U. S. 383 (1914), it is understandable that virtually all of this Court's search-and-seizure law has been developed since that time. In *Weeks*, the Court made clear its recognition of the validity of a search incident to a lawful arrest:

> "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the

> Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245." *Id.*, at 392.

Agnello v. *United States*, 269 U. S. 20 (1925), decided 11 years after *Weeks*, repeats the categorical recognition of the validity of a search incident to lawful arrest:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." *Id.*, at 30.

Throughout the series of cases in which the Court has addressed the second proposition relating to a search incident to a lawful arrest—the permissible area beyond the person of the arrestee which such a search may cover—no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee. *E. g.*, *Carroll* v. *United States*, 267 U. S. 132 (1925); *Marron* v. *United States*, 275 U. S. 192 (1927); *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Harris* v. *United States*, 331 U. S. 145 (1947); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *Preston* v. *United States*, 376 U. S. 364 (1964); *Chimel* v. *California*, 395 U. S. 752 (1969). In *Chimel*, where the Court overruled *Rabinowitz* and *Harris* as to the area

of permissible search incident to a lawful arrest, full recognition was again given to the authority to search the person of the arrestee:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 395 U. S., at 762–763.

Three years after the decision in *Chimel, supra,* we upheld the validity of a search in which heroin had been taken from the person of the defendant after his arrest on a weapons charge, in *Adams* v. *Williams,* 407 U. S. 143 (1972), saying:

> "Under the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful." *Id.,* at 149.

Last Term in *Cupp* v. *Murphy,* 412 U. S. 291, 295 (1973), we again reaffirmed the traditional statement of the authority to search incident to a valid arrest.

Thus the broadly stated rule, and the reasons for it, have been repeatedly affirmed in the decisions of this Court since *Weeks* v. *United States, supra,* nearly 60 years ago. Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.

II

In its decision of this case, the Court of Appeals decided that even after a police officer lawfully places a suspect under arrest for the purpose of taking him into custody, he may not ordinarily proceed to fully search the prisoner. He must, instead, conduct a limited frisk of the outer clothing and remove such weapons that he may, as a result of that limited frisk, reasonably believe and ascertain that the suspect has in his possession. While recognizing that *Terry* v. *Ohio*, 392 U. S. 1 (1968), dealt with a permissible "frisk" incident to an investigative stop based on less than probable cause to arrest, the Court of Appeals felt that the principles of that case should be carried over to this probable-cause arrest for driving while one's license is revoked. Since there would be no further evidence of such a crime to be obtained in a search of the arrestee, the court held that only a search for weapons could be justified.

Terry v. *Ohio, supra,* did not involve an arrest for probable cause, and it made quite clear that the "protective frisk" for weapons which it approved might be conducted without probable cause. *Id.*, at 21–22, 24–25. This Court's opinion explicitly recognized that there is a "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons."

> "The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States,* 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigen-

cies which justify its initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.

". . . An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.*, at 25–26 (footnote omitted).

Terry, therefore, affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause.

The Court of Appeals also relied on language in *Peters* v. *New York*, 392 U. S. 40, 66 (1968), a companion case to *Terry*. There the Court held that the police officer had authority to search Peters because he had probable cause to arrest him, and went on to say:

"[T]he incident search was obviously justified 'by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the

> destruction of evidence of the crime.' *Preston* v. *United States,* 376 U. S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects." *Id.,* at 67.

It is, of course, possible to read the second sentence from this quotation as imposing a novel limitation on the established doctrine set forth in the first sentence. It is also possible to read it as did Mr. Justice Harlan in his opinion concurring in the result:

> "The second possible source of confusion is the Court's statement that 'Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects.' [392 U. S.], at 67. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search, I assume that this is merely a factual observation. As a factual matter, I agree with it." *Id.,* at 77 (footnote omitted).

We do not believe that the Court in *Peters* intended in one unexplained and unelaborated sentence to impose a novel and far-reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest. While the language from *Peters* was quoted with approval in *Chimel* v. *California,* 395 U. S., at 764, it is preceded by a full exposition of the traditional and unqualified authority of the arresting officer to search the arrestee's person. *Id.,* at 763. We do not believe that either *Terry* or *Peters,* when considered in the light of the previously discussed statements of this Court, justified the sort of limitation upon that authority which the Court of Appeals fashioned in this case.

III

Virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta. We would not, therefore, be foreclosed by principles of *stare decisis* from further examination into history and practice in order to see whether the sort of qualifications imposed by the Court of Appeals in this case were in fact intended by the Framers of the Fourth Amendment or recognized in cases decided prior to *Weeks*. Unfortunately such authorities as exist are sparse. Such common-law treatises as Blackstone's Commentaries and Holmes' Common Law are simply silent on the subject. Pollock and Maitland, in their History of English Law, describe the law of arrest as "rough and rude" before the time of Edward I, but do not address the authority to search incident to arrest. 2 F. Pollock & F. Maitland, The History of English Law 582 (2d ed. 1909).

The issue was apparently litigated in the English courts in *Dillon* v. *O'Brien*, 16 Cox C. C. 245 (Exch. Ireland, 1887), cited in *Weeks* v. *United States*, *supra*, There Baron Palles said:

> "But the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture." 16 Cox C. C., at 250.

Spalding v. *Preston,* 21 Vt. 9 (1848), represents an early holding in this country that evidence may be seized from one who is lawfully arrested. In *Closson* v. *Morrison,* 47 N. H. 482 (1867), the Court made the following statement:

> "[W]e think that an officer would also be justified in taking from a person whom he had arrested for crime, any deadly weapon he might find upon him, such as a revolver, a dirk, a knife, a sword cane, a slung shot, or a club, though it had not been used or intended to be used in the commission of the offence for which the prisoner had been arrested, and even though no threats of violence towards the officer had been made. A due regard for his own safety on the part of the officer, and also for the public safety, would justify a sufficient search to ascertain if such weapons were carried about the person of the prisoner, or were in his possession, and if found, to seize and hold them until the prisoner should be discharged, or until they could be otherwise properly disposed of. *Spalding* v. *Preston,* 21 Vt. 9, 16.
>
> "So we think it might be with money or other articles of value, found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools, or implements, or weapons with which to effect his escape. We think the officer arresting a man for crime, not only may, but frequently should, make such searches and seizures; that in many cases they might be reasonable and proper, and courts would hold him harmless for so doing, when he acts in good faith, and from a regard to his own or the public safety, or the security of his prisoner." *Id.,* at 484–485.

Similarly, in *Holker* v. *Hennessey,* 141 Mo. 527, 42 S. W. 1090 (1897), the Supreme Court of Missouri said:

> "Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape." *Id.,* at 539, 42 S. W., at 1093.

Then Associate Judge Cardozo of the New York Court of Appeals summarized his understanding of the historical basis for the authority to search incident to arrest in these words:

> "The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation [citation omitted]. Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.
>
> "The distinction may seem subtle, but in truth it is founded in shrewd appreciation of the necessities of government. We are not to strain an immunity to the point at which human nature rebels against honoring it in conduct. The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime." *People* v. *Chiagles,* 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923).

While these earlier authorities are sketchy, they tend to support the broad statement of the authority to

search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case. The scarcity of case law before *Weeks* is doubtless due in part to the fact that the exclusionary rule there enunciated had been first adopted only 11 years earlier in Iowa; but it would seem to be also due in part to the fact that the issue was regarded as well settled.[3]

The Court of Appeals in effect determined that the *only* reason supporting the authority for a *full* search incident to lawful arrest was the possibility of discovery of evidence or fruits.[4] Concluding that there could be no evidence or fruits in the case of an offense such as that with which respondent was charged, it held that any protective search would have to be limited by the conditions laid down in *Terry* for a search upon less than probable cause to arrest. Quite apart from the fact that *Terry* clearly recognized the distinction between the two types of searches, and that a different rule governed one than governed the other, we find additional reason to disagree with the Court of Appeals.

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[3] See T. Taylor, Two Studies in Constitutional Interpretation 44–45 (1969).

Taylor suggests that there "is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." *Id.*, at 28. "Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century . . . [and] the English courts gave the point short shrift." *Id.*, at 29.

[4] Where the arrest is made for a crime for which it is reasonable to believe that evidence exists, the Court of Appeals recognizes that "warrantless intrusion into the pockets of the arrestee to discover such evidence is reasonable under the 'search incident' exception." 153 U. S. App. D. C., at 127, 471 F. 2d, at 1095. The court then states that the officer may use this "reasonable [evidentiary] intrusion" to simultaneously look for weapons. *Ibid.*

The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. *Agnello* v. *United States*, 269 U. S. 20 (1925); *Abel* v. *United States*, 362 U. S. 217 (1960). The standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made.

Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes.[5] It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which

[5] Such an assumption appears at least questionable in light of the available statistical data concerning assaults on police officers who are in the course of making arrests. The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest. One study concludes that approximately 30% of the shootings of police officers occur when an officer stops a person in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963), cited in *Adams* v. *Williams*, 407 U. S. 143, 148 (1972). The Government in its brief notes that the Uniform Crime Reports, prepared by the Federal Bureau of Investigation, indicate that a significant percentage of murders of police officers occurs when the officers are making traffic stops. Brief for the United States 23. Those reports indicate that during January–March 1973, 35 police officers were murdered; 11 of those officers were killed while engaged in making traffic stops. *Ibid.*

follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to *Weeks,* or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication. A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

IV

The search of respondent's person conducted by Officer Jenks in this case and the seizure from him of the heroin, were permissible under established Fourth Amendment law. While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin* v. *California*, 342 U. S. 165 (1952). Since it is the fact of custodial arrest which gives rise to the authority to search,[6] it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.[7] Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct. *Harris* v. *United States*, 331 U. S., at 154–155; *Warden* v. *Hayden*, 387 U. S. 294, 299, 307 (1967); *Adams* v. *Williams*, 407 U. S., at 149.

[6] The opinion of the Court of Appeals also discussed its understanding of the law where the police officer makes what the court characterized as "a routine traffic stop," *i. e.*, where the officer would simply issue a notice of violation and allow the offender to proceed. Since in this case the officer did make a full-custody arrest of the violator, we do not reach the question discussed by the Court of Appeals.

[7] The United States concedes that "in searching respondent, [Officer Jenks] was not motivated by a feeling of imminent danger and was not specifically looking for weapons." Brief for the United States 34. Officer Jenks testified, "I just searched him [Robinson]. I didn't think about what I was looking for. I just searched him." As previously noted, Officer Jenks also testified that upon removing the cigarette package from the respondent's custody, he was still unsure what was in the package, but that he knew it was not cigarettes.

The judgment of the Court of Appeals holding otherwise is

Reversed.

MR. JUSTICE POWELL, concurring.*

Although I join the opinions of the Court, I write briefly to emphasize what seems to me to be the essential premise of our decisions.

The Fourth Amendment safeguards the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These are areas of an individual's life about which he entertains legitimate expectations of privacy. I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee.[1] The search incident to arrest

*This opinion also applies to No. 71–1669, *Gustafson* v. *Florida*, *post*, p. 260.

[1] The Court of Appeals for the Ninth Circuit aptly stated this rationale in *Charles* v. *United States*, 278 F. 2d 386, 388–389 (1960):

"Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to

is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.[2]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Certain fundamental principles have characterized this Court's Fourth Amendment jurisprudence over the years. Perhaps the most basic of these was expressed by Mr. Justice Butler, speaking for a unanimous Court in *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Id.*, at 357. As we recently held: "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron* v. *New York*, 392 U. S. 40, 59 (1968). And the intensive, at times painstaking, case-by-case analysis characteristic of our Fourth Amendment decisions bespeaks our "jealous regard for maintaining the integrity of individual rights." *Mapp* v. *Ohio*, 367 U. S. 643, 647

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ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, unless they violate the dictates of reason either because of their number or their manner of perpetration." (Citation omitted.)

[2] In *Gustafson, post*, p. 260, the petitioner conceded the validity of the custodial arrest, although that conclusion was not as self-evident as in *Robinson*. *Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives. But no such question is before us.

(1961). See also *Weeks* v. *United States,* 232 U. S. 383, 393 (1914).

In the present case, however, the majority turns its back on these principles, holding that "the fact of the lawful arrest" always establishes the authority to conduct a full search of the arrestee's person, regardless of whether in a particular case "there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Ante,* at 235. The majority's approach represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment. I continue to believe that "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry* v. *Ohio,* 392 U. S. 1, 21 (1968). Because I find the majority's reasoning to be at odds with these fundamental principles, I must respectfully dissent.

I

On April 19, 1968, Officer Richard Jenks stopped a 1965 Cadillac driven by respondent at the intersection of 9th and U Streets, N. W., in the District of Columbia, for what was called a "routine spot check." At that time, Officer Jenks examined respondent's temporary operator's permit, automobile registration card, and Selective Service classification card. Although he permitted respondent to go on his way, Officer Jenks pursued a discrepancy he had noted between the "1938" date of birth given on the operator's permit and the "1927" date of birth given on the Selective Service card. A check of police traffic records showed that an operator's

permit issued to one Willie Robinson, Jr., born in 1927, had been revoked, and that a temporary operator's permit had subsequently been issued to one Willie Robinson, born in 1938. The pictures on the revoked permit and on the application for the temporary permit were of the same man—the person stopped by Jenks for the routine check on April 19. Having investigated the matter himself in this fashion, it is clear that Officer Jenks had probable cause to believe that respondent had violated a provision of the District of Columbia Motor Vehicle Code making it unlawful for any person to operate a motor vehicle in the District during the period for which his operator's permit is revoked. D. C. Code Ann. § 40–302 (d) (1967).

Four days later, on April 23, 1968, while on duty in their patrol car, Officer Jenks and his partner saw respondent driving the same vehicle. They pulled up behind respondent's car and signaled it to stop. From all indications in the record, respondent immediately complied and brought his car to a stop alongside the curb, the officers parking their patrol car immediately behind his.

Respondent got out of his car and walked back toward the patrol car. Both Officer Jenks and his partner got out of the patrol car and started toward respondent's car. Officer Jenks asked respondent for his permit and registration card and, when shown the same permit respondent had given him four days earlier, informed respondent that he was under arrest for operating a motor vehicle after revocation of his operator's permit.

Jenks then began to search respondent. His normal procedure in conducting a search of an arrestee would be to "have him spread-eagle over a wall or something of that nature." But in Jenks' own words, "I think almost every search is different. It depends on the man's size and the nature of the crime." Since he had a substantial

height and weight advantage over respondent, and because the arrest was only for a traffic offense, Jenks chose instead to conduct the search face to face, in contrast to his normal practice.

The first step in the search was for Jenks to place both his hands on respondent's chest and begin to pat him down. During this patdown, Jenks felt something in the left breast pocket of respondent's heavy overcoat. Jenks later testified that he could not immediately tell what was in the pocket. The record does indicate, however, that the object did not feel like a gun and that Jenks had no particular indication it was a weapon of any kind.[1] Nonetheless, he reached into the pocket and took the object out. It turned out to be a crumpled-up cigarette package.

With the package now in his hands, Jenks could feel objects inside but could not tell what they were. It does not appear that Jenks had any reason to believe, or did in fact believe, that the objects were weapons of any sort. He nevertheless opened up the package and looked inside, thereby finding the gelatin capsules of heroin which were introduced against respondent at his trial for the possession and facilitation of concealment of heroin.

II

Mr. Justice Jackson, writing for the Court in *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948), explained:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies

[1] At the suppression hearing, Officer Jenks was shown a small derringer and was asked, after the gun was placed in a coat pocket, "whether or not it feels like the lump you felt in Mr. Robinson's pocket the night you arrested him?" Jenks answered that the object "does not feel the same" but rather felt "harder," "larger," and "[m]uch more suspicious."

> law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449 (1971). The majority's fear of overruling the "quick *ad hoc* judgment" of the police officer is thus inconsistent with the very function of the Amendment—to ensure that the quick *ad hoc* judgments of police officers are subject to review and control by the judiciary.

In the vast majority of cases, the determination of when the right of privacy must reasonably yield to the right of search is required to be made by a neutral judicial officer before the search is conducted. See *Katz* v. *United States,* 389 U. S. 347, 356–357 (1967); *Agnello* v. *United States,* 269 U. S. 20, 33 (1925). The Constitution requires that "the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun* v. *United States,* 371 U. S. 471, 481–482 (1963).

The requirement that the police seek prior approval of a search from a judicial officer is, no doubt, subject to "a few specifically established and well-delineated exceptions," *Katz* v. *United States, supra,* at 357; including searches of a moving vehicle, *Carroll* v. *United States,* 267 U. S. 132 (1925); searches in certain exigent circumstances, *Warden* v. *Hayden,* 387 U. S. 294, 298–299 (1967); *McDonald* v. *United States,* 335 U. S. 451, 454–455 (1948); and searches incident to a lawful

arrest, *Agnello* v. *United States, supra; Chimel* v. *California,* 395 U. S. 752 (1969). But because an exception is invoked to justify a search without a warrant does not preclude further judicial inquiry into the reasonableness of that search. It is the role of the judiciary, not of police officers, to delimit the scope of exceptions to the warrant requirement. "[T]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .'" *Id.,* at 762, quoting *United States* v. *Jeffers,* 342 U. S. 48, 51 (1951). Exceptions to the warrant requirement are not talismans precluding further judicial inquiry whenever they are invoked, see *Coolidge* v. *New Hampshire, supra,* at 461, but rather are "jealously and carefully drawn." *Jones* v. *United States,* 357 U. S. 493, 499 (1958).

Carrying out our mandate of delineating the proper scope of the search-incident-to-arrest exception requires consideration of the purposes of that exception as they apply to the particular search that occurred in this case. See *Chimel* v. *California, supra,* at 762–763; *Preston* v. *United States,* 376 U. S. 364, 367 (1964). Yet the majority, rather than focusing on the facts of this case, places great emphasis on the police department order which instructed Officer Jenks to conduct a full search and to examine carefully everything he found whenever making an in-custody arrest. See *ante,* at 221 and n. 2. But this mode of analysis was explicitly rejected in *Sibron* v. *New York,* 392 U. S. 40 (1968). There both the defendant and the State urged that the principal issue before us was the constitutionality of a state statute which authorized the search there in question. We declined, however, to engage in what we viewed "as the abstract and unproductive exercise" of laying the words of the statute next to the Fourth Amendment "in an effort to determine whether the two are in some

sense compatible." *Id.*, at 59. "Our constitutional inquiry," we concluded, "would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions." *Id.*, at 62.

The majority also suggests that the Court of Appeals reached a novel and unprecedented result by imposing qualifications on the historically recognized authority to conduct a full search incident to a lawful arrest. Nothing could be further from the truth, as the Court of Appeals itself was so careful to point out.

One need not go back to Blackstone's Commentaries, Holmes' Common Law, or Pollock & Maitland in search of precedent for the approach adopted by the Court of Appeals. Indeed, given the fact that mass production of the automobile did not begin until the early decades of the present century, I find it somewhat puzzling that the majority even looks to these sources for guidance on the only question presented in this case: the permissible scope of a search of the person incident to a lawful arrest for violation of a motor vehicle regulation. The fact is that this question has been considered by several state and federal courts, the vast majority of which have held that, absent special circumstances, a police officer has no right to conduct a full search of the person incident to a lawful arrest for violation of a motor vehicle regulation.

In *Barnes* v. *State*, 25 Wis. 2d 116, 130 N. W. 2d 264 (1964), for example, police officers stopped a car for a brake-light violation. Rather than simply issue a citation, the officers placed the driver under arrest. A full search of the driver's person was then conducted, including shining a flashlight into his overcoat pocket, disclosing a small quantity of marihuana and a package of cigarette papers. The Supreme Court of Wisconsin held

the search of the driver's pocket unreasonable. While expressly holding that where a traffic offender is actually arrested, as distinguished from being given a summons, it is reasonable for the arresting officer to search his person for weapons, nevertheless the court held it unreasonable to look inside the driver's overcoat pocket with a flashlight. "We cannot conceive," the court said, "that this aspect of the search was a legitimate search for weapons. . . . We reject the state's contention that any search of the person of one lawfully arrested is a valid search." *Id.*, at 126, 130 N. W. 2d, at 269.

In *State* v. *Curtis*, 290 Minn. 429, 190 N. W. 2d 631 (1971), police officers stopped a car which had defective taillights and which had made an illegal right turn. The officers decided to take the driver down to the station house and searched him for weapons before putting him in the squad car. One of the officers felt the outside of the driver's pockets. As in Robinson's case, the officer "detected some object but couldn't tell what it was. It did not feel like a gun or knife." *Id.*, at 430, 190 N. W. 2d, at 632. "Neither officer expressed any concern for his personal safety. There was no testimony that they suspected defendant of any other criminal activity or were aware of any dangerous propensities on his part." *Id.*, at 431, 190 N. W. 2d, at 633. Nevertheless the officer reached into the pocket, resulting in the discovery of a package of marihuana. The Minnesota Supreme Court held the search unlawful. While recognizing the "concern for the injuries and loss of life experienced by police officers in face-to-face confrontations with traffic offenders," the court held that "the validity of a search for weapons following a traffic arrest depends on whether the officer had reasonable grounds to believe a search was necessary for his own safety or to prevent an escape." *Id.*, at 436–437, 190 N. W. 2d, at 636, citing *Shelton*

v. *State*, 3 Md. App. 394, 399, 239 A. 2d 610, 613 (1968).

Of like import is the decision of the Oregon Supreme Court in *State* v. *O'Neal*, 251 Ore. 163, 444 P. 2d 951 (1968) (en banc). Here defendant's automobile was stopped because it had no rear license plate. When asked to produce an operator's license, the defendant produced a temporary operator's license issued to another person which had expired several years earlier. The officers then arrested defendant and placed him in the back seat of the police car. "One of the officers got in the police car and asked the defendant to remove his money from his wallet and give his wallet to the officer. The defendant did so and the officer took papers from the wallet and examined them. When the officer unfolded one piece of paper a half-smoked marijuana cigarette fell out." *Id.*, at 164–165, 444 P. 2d, at 952. The court held the search unlawful. Again, while recognizing the officer's right to conduct a search incident to arrest in order to protect the officer and deprive the prisoner of potential means of escape, the court held:

> "The search of the wallet obviously had nothing to do with the officers' safety. The defendant testified that the officers 'patted him down' before placing him in the police car. The officers did not remember whether they had or had not. In any event, it is difficult to see how defendant's wallet could have reasonably been believed to have contained a weapon." *Id.*, at 166, 444 P. 2d, at 953.

See also *People* v. *Marsh*, 20 N. Y. 2d 98, 228 N. E. 2d 783 (1967); *People* v. *Superior Court of Los Angeles County*, 7 Cal. 3d 186, 496 P. 2d 1205 (1972); *State* v. *Quintana*, 92 Ariz. 267, 376 P. 2d 130 (1962) (en banc); *People* v. *Zeigler*, 358 Mich. 355, 100 N. W. 2d 456 (1960). The Tenth Circuit has likewise stated that it is "in complete agreement with the prevailing federal and state authority

which condemns the search of persons and automobiles following routine traffic violations." *United States* v. *Humphrey*, 409 F. 2d 1055, 1058 (1969). See also *Amador-Gonzalez* v. *United States*, 391 F. 2d 308, 315 (CA5 1968) (Wisdom, J.).

Accordingly, I think it disingenuous for the Court to now pronounce that what precedents exist on the question "tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case." [2] *Ante*, at 232–233. It is disquieting, to say the least, to see the Court at once admit that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta" and concede that we are presented with an open question on which "further examination into history and practice" would be helpful, yet then conduct an examina-

[2] Even the Court's attempt to dip into the English common law is selective. The power to conduct a search incident to arrest was litigated in *Leigh* v. *Cole*, 6 Cox C. C. 329 (Oxford Circuit 1853), a civil case in which the plaintiff, a lawyer, was stopped while on the road and arrested by defendant superintendent of police. After the plaintiff was taken to the station house, a police constable searched him, at the defendant's direction, and a tobacco box and a piece of paper were taken from him. In instructing the jury, the learned judge stated: "With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that a general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case." *Id.*, at 332.

tion into prior practice which is not only wholly superficial, but totally inaccurate and misleading.

The majority's attempt to avoid case-by-case adjudication of Fourth Amendment issues is not only misguided as a matter of principle, but is also doomed to fail as a matter of practical application. As the majority itself is well aware, see *ante,* at 221 n. 1, the powers granted the police in this case are strong ones, subject to potential abuse. Although, in this particular case, Officer Jenks was required by police department regulations to make an in-custody arrest rather than to issue a citation, in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer. There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search. See, *e. g., Amador-Gonzalez* v. *United States, supra.* I suggest this possibility not to impugn the integrity of our police, but merely to point out that case-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee. "An arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz,* 285 U. S. 452, 467 (1932). See also *Jones* v. *United States,* 357 U. S., at 500; *Abel* v. *United States,* 362 U. S. 217, 226 and 230 (1960); *United States* v. *Rabinowitz,* 339 U. S. 56, 82 (1950) (Frankfurter, J., dissenting). Cf. *Chimel* v. *California,* 395 U. S., at 767–768.

III

The majority states that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not

require to be broken down in each instance into an analysis of each step in the search." [3] *Ante,* at 235. No precedent is cited for this broad assertion—not surprisingly, since there is none. Indeed, we only recently rejected such "a rigid all-or-nothing model of justification and regulation under the Amendment, [for] it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry* v. *Ohio,* 392 U. S., at 17–18. As we there concluded, "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.,* at 19–20.

As I view the matter, the search in this case divides into three distinct phases: the patdown of respondent's coat pocket; the removal of the unknown object from the

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[3] The majority's reference to the quick *ad hoc* judgment of the police officer may be read as an expression of doubt whether this kind of on-the-street police activity can effectively be controlled by court-imposed standards. This problem was discussed in *Terry* v. *Ohio,* 392 U. S. 1 (1968), where we recognized "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Id.,* at 12. But as we concluded there, even though "[n]o judicial opinion can comprehend the protean variety of the street encounter, . . . courts still retain their traditional responsibility to guard against police conduct . . . which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." *Id.,* at 15.

pocket; and the opening of the crumpled-up cigarette package.

A

No question is raised here concerning the lawfulness of the patdown of respondent's coat pocket. The Court of Appeals unanimously affirmed the right of a police officer to conduct a limited frisk for weapons when making an in-custody arrest, regardless of the nature of the crime for which the arrest was made. As it said:

> "[I]t would seem clearly unreasonable to expect a police officer to place a suspect in his squad car for transportation to the stationhouse without first taking reasonable measures to insure that the suspect is unarmed. We therefore conclude that whenever a police officer, acting within the bounds of his authority, makes an in-custody arrest, he may also conduct a limited *frisk* of the suspect's outer clothing in order to remove any weapons the suspect may have in his possession." 153 U. S. App. D. C. 114, 130, 471 F. 2d 1082, 1098 (1972) (footnote omitted; emphasis in original).

B

With respect to the removal of the unknown object from the coat pocket, the first issue presented is whether that aspect of the search can be sustained as part of the limited frisk for weapons. The weapons search approved by the Court of Appeals was modeled upon the narrowly drawn protective search for weapons authorized in *Terry*, which consists "of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." See *Sibron* v. *New York*, 392 U. S., at 65. See also *Terry, supra*, at 30.

It appears to have been conceded by the Government below that the removal of the object from respondent's coat pocket exceeded the scope of a *Terry* frisk for

weapons, since, under *Terry*, an officer may not remove an object from the suspect's pockets unless he has reason to believe it to be a dangerous weapon. 153 U. S. App. D. C., at 121 and n. 9, 471 F. 2d, at 1089 and n. 9, citing ALI Model Code of Pre-Arraignment Procedure § 110.2 (4) (Proposed Official Draft No. 1, 1972). Cf. *Sibron* v. *New York, supra,* at 65.[4]

In the present case, however, Officer Jenks had no reason to believe and did not in fact believe that the object in respondent's coat pocket was a weapon. He admitted later that the object did not feel like a gun. See n. 1, *supra.* In fact, he did not really have any thoughts one way or another about what was in the pocket. As Jenks himself testified, "I just searched him. I didn't think about what I was looking for. I just searched him." Since the removal of the object from the pocket cannot be justified as part of a limited *Terry* weapons frisk, the question arises whether it is reasonable for a police officer, when effecting an in-custody arrest of a traffic offender, to make a fuller search of the person than is permitted pursuant to *Terry.*

The underlying rationale of a search incident to arrest of a traffic offender initially suggests as reasonable a search whose scope is similar to the protective weapons frisk permitted in *Terry.* A search incident to arrest, as the majority indicates, has two basic functions: the removal of weapons the arrestee might use to resist arrest or effect an escape, and the seizure of evidence or fruits of the crime for which the arrest is made, so as to prevent their concealment or destruction. See *ante,* at 234; *Chimel* v. *California,* 395 U. S., at 763.

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[4] This was also the position of the Police Department itself. Sergeant Donaldson, a Police Department Training Division instructor, testified: "If [the officer] could determine in his pat-down or frisk by squeezing that it was not, in fact, a weapon that could be used against him, then we don't instruct him to go further."

The Government does not now contend that the search of respondent's pocket can be justified by any need to find and seize evidence in order to prevent its concealment or destruction, for, as the Court of Appeals found, there is no evidence or fruits of the offense with which respondent was charged. The only rationale for a search in this case, then, is the removal of weapons which the arrestee might use to harm the officer and attempt an escape. This rationale, of course, is identical to the rationale of the search permitted in *Terry*. As we said there, "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry* v. *Ohio, supra,* at 29. Since the underlying rationale of a *Terry* search and the search of a traffic violator are identical, the Court of Appeals held that the scope of the searches must be the same. And in view of its conclusion that the removal of the object from respondent's coat pocket exceeded the scope of a lawful *Terry* frisk, a conclusion not disputed by the Government or challenged by the majority here, the plurality of the Court of Appeals held that the removal of the package exceeded the scope of a lawful search incident to arrest of a traffic violator.

The problem with this approach, however, is that it ignores several significant differences between the context in which a search incident to arrest for a traffic violation is made, and the situation presented in *Terry*. Some of these differences would appear to suggest permitting a more thorough search in this case than was permitted in *Terry;* other differences suggest a narrower, more limited right to search than was there recognized.

The most obvious difference between the two contexts relates to whether the officer has cause to believe that

the individual he is dealing with possesses weapons which might be used against him. *Terry* did not permit an officer to conduct a weapons frisk of anyone he lawfully stopped on the street, but rather, only where "he has reason to believe that he is dealing with an armed and dangerous individual . . . ." 392 U. S., at 27. While the policeman who arrests a suspected rapist or robber may well have reason to believe he is dealing with an armed and dangerous person, certainly this does not hold true with equal force with respect to a person arrested for a motor vehicle violation of the sort involved in this case.

Nor was there any particular reason in this case to believe that respondent was dangerous. He had not attempted to evade arrest, but had quickly complied with the police both in bringing his car to a stop after being signaled to do so and in producing the documents Officer Jenks requested. In fact, Jenks admitted that he searched respondent face to face rather than in spread-eagle fashion because he had no reason to believe respondent would be violent.

While this difference between the situation presented in *Terry* and the context presented in this case would tend to suggest a lesser authority to search here than was permitted in *Terry*, other distinctions between the two cases suggest just the opposite. As the Court of Appeals noted, a crucial feature distinguishing the in-custody arrest from the *Terry* context " 'is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed.' " 153 U. S. App. D. C., at 130, 471 F. 2d, at 1098, quoting *People* v. *Superior Court of Los Angeles County*, 7 Cal. 3d, at 214, 496 P. 2d, at 1225 (Wright, C. J., concurring) (emphasis in original). A *Terry* stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in close proximity

for a much longer period of time. If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer in the in-custody situation. The prolonged proximity also makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force.

Thus, in some senses there is less need for a weapons search in the in-custody traffic arrest situation than in a *Terry* context; while in other ways, there is a greater need. Balancing these competing considerations in order to determine what is a reasonable warrantless search in the traffic arrest context is a difficult process, one for which there may be no easy analytical guideposts. We are dealing with factors not easily quantified and, therefore, not easily weighed one against the other. And the competing interests we are protecting—the individual's interest in remaining free from unnecessarily intrusive invasions of privacy and society's interest that police officers not take unnecessary risks in the performance of their duties—are each deserving of our most serious attention and do not themselves tip the balance in any particular direction.

As will be explained more fully below, I do not think it necessary to solve this balancing equation in this particular case. It is important to note, however, in view of the reasoning adopted by the majority, that available empirical evidence supports the result reached by the plurality of the Court of Appeals, rather than the result reached by the Court today.

The majority relies on statistics indicating that a significant percentage of murders of police officers occurs when the officers are making traffic stops. But these statistics only confirm what we recognized in *Terry*—that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Terry* v. *Ohio, supra,* at 23. As the very next sentence in *Terry* recognized, however, "[v]irtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives." *Id.,* at 24. The statistics relied on by the Government in this case support this observation. Virtually all of the killings are caused by guns and knives, the very type of weapons which will not go undetected in a properly conducted weapons frisk.[5] It requires more than citation to these statistics, then, to support the proposition that it is reasonable for police officers to conduct more than a *Terry*-type frisk for weapons when seeking to disarm a traffic offender who is taken into custody.

C

The majority opinion fails to recognize that the search conducted by Officer Jenks did not merely involve a search of respondent's person. It also included a separate search of effects found on his person. And even were we to assume, *arguendo,* that it was reasonable for Jenks to remove the object he felt in respondent's pocket, clearly there was no justification consistent with

[5] The Uniform Crime Reports prepared by the Federal Bureau of Investigation which are relied on by the majority, see *ante,* at 234 n. 5, indicate that 112 police officers were killed nationwide in 1972. Of these, 108 were killed by firearms. Two of the remaining four were killed with knives, and the last two cases involved a bomb and an automobile.

the Fourth Amendment which would authorize his opening the package and looking inside.

To begin with, after Jenks had the cigarette package in his hands, there is no indication that he had reason to believe or did in fact believe that the package contained a weapon. More importantly, even if the crumpled-up cigarette package had in fact contained some sort of small weapon, it would have been impossible for respondent to have used it once the package was in the officer's hands. Opening the package, therefore, did not further the protective purpose of the search. Even the dissenting opinion in the Court of Appeals conceded that "since the package was now in the officer's possession, any risk of the prisoner's use of a weapon in this package had been eliminated." [6] 153 U. S. App. D. C., at 150, 471 F. 2d, at 1118 (Wilkey, J., dissenting).

It is suggested, however, that since the custodial arrest itself represents a significant intrusion into the privacy of the person, any additional intrusion by way of opening or examining effects found on the person is not worthy of constitutional protection. But such an approach was expressly rejected by the Court in *Chimel*. There it

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[6] The dissent argued, however, that "further inspection of the package was still justifiable as a protective measure. If the package *had* contained a razor blade, or live bullets, the officer would have been alerted to search Robinson much more thoroughly since the possibility of there being other weapons concealed on his person would increase." 153 U. S. App. D. C., at 150, 471 F. 2d, at 1118 (emphasis in original). But as Chief Judge Bazelon indicated in his opinion below, this kind of reasoning would render meaningless scope limitations on searches. Were one to accept this logic, for example, it would have been reasonable for the police to search the entire house in *Chimel* v. *California*, 395 U. S. 752 (1969), for if a weapon had been found somewhere in the house, the arresting officer would have been alerted to search Chimel himself more thoroughly, as the possibility of there being other weapons concealed on his person would arguably have increased.

was suggested that since the police had lawfully entered petitioner's house to effect an arrest, the additional invasion of privacy stemming from an accompanying search of the entire house was inconsequential. The Court answered: "[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." 395 U. S., at 766–767, n. 12.

The Fourth Amendment preserves the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." *Chimel* established the principle that the lawful right of the police to interfere with the security of the person did not, standing alone, automatically confer the right to interfere with the security and privacy of his house. Hence, the mere fact of an arrest should be no justification, in and of itself, for invading the privacy of the individual's personal effects.

The Government argues that it is difficult to see what constitutionally protected "expectation of privacy" a prisoner has in the interior of a cigarette pack. One wonders if the result in this case would have been the same were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere in the wallet, to open it, remove all the contents, and examine each item carefully? Or suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade? Cf. *Harris* v. *United*

States, 331 U. S. 145 (1947); *Chimel* v. *California*, *supra*, at 758. Would it not be more consonant with the purpose of the Fourth Amendment and the legitimate needs of the police to require the officer, if he has any question whatsoever about what the wallet or letter contains, to hold on to it until the arrestee is brought to the precinct station? [7]

[7] Nor would it necessarily have been reasonable for the police to have opened the cigarette package at the police station. The Government argued below, as an alternative theory to justify the search in this case, that when a suspect is booked and is about to be placed in station house detention, it is reasonable to search his person to prevent the introduction of weapons or contraband into the jail facility and to inventory the personal effects found on the suspect. Since respondent's cigarette package would have been removed and opened at the station house anyway, the argument goes, the search might just as well take place in the field at the time of the arrest. This argument fails for two reasons. First, as the Court of Appeals had indicated in its opinion in *United States* v. *Mills*, 153 U. S. App. D. C. 156, 472 F. 2d 1231 (1972) (en banc), the justification for station-house searches is not the booking process itself, but rather the fact that the suspect will be placed in jail. In the District of Columbia, petty offenses of the sort involved in the present case are bailable, and, as the Government stipulated in *Mills*, the normal procedure is for offenders to be advised of the opportunity to post collateral at the station house and to avoid an inventory search unless they are unable or refuse to do so. *Id.*, at 160–161, 472 F. 2d, at 1235–1236. One cannot justify a full search in the field on a subsequent event that quite possibly may never take place.

Second, even had it become necessary to place respondent in confinement, it is still doubtful whether one could justify opening up the cigarette package and examining its contents. The purposes of preventing the introduction of weapons or contraband into the jail facility are fully served simply by removing the package from the prisoner. It is argued that the police must inventory effects found on the prisoner in order to avoid a later claim by the prisoner that jail personnel stole his property. But as the Court of Appeals noted in *Mills*, the police can protect themselves against such claims by means involving a less extreme intrusion on privacy than would be entailed in opening up and examining the

I, for one, cannot characterize any of these intrusions into the privacy of an individual's papers and effects as being negligible incidents to the more serious intrusion into the individual's privacy stemming from the arrest itself. Nor can any principled distinction be drawn between the hypothetical searches I have posed and the search of the cigarette package in this case. The only reasoned distinction is between warrantless searches which serve legitimate protective and evidentiary functions and those that do not. See *Chimel, supra,* at 766.

The search conducted by Officer Jenks in this case went far beyond what was reasonably necessary to protect him from harm or to ensure that respondent would not effect an escape from custody. In my view, it therefore fell outside the scope of a properly drawn "search incident to arrest" exception to the Fourth Amendment's warrant requirement. I would affirm the judgment of the Court of Appeals holding that the fruits of the search should have been suppressed at respondent's trial.

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contents of all effects found on the person. As an example, the Court of Appeals suggested that the prisoner be given "an opportunity, like that accorded someone given a bathhouse locker for temporary use, to 'check' his belongings in a sealed envelope, perhaps upon executing a waiver releasing the officer of any responsibility." *Id.,* at 164 n. 11, 472 F. 2d, at 1239 n. 11.

The Government also suggested in oral argument before this Court that it would be administratively inconvenient to require a police officer, after removing an object from an arrestee, to hold on to the object rather than to look inside and determine what it contained. Mere administrative inconvenience, however, cannot justify invasion of Fourth Amendment rights. See *Chimel* v. *California, supra,* at 768. One can no doubt imagine cases where the inconvenience might be so substantial as to interfere with the task of transporting the suspect into custody. While these situations might necessitate a different rule, certainly in this case there would have been no inconvenience whatsoever. Officer Jenks could easily have placed the cigarette package in his own pocket or handed it to his partner to hold onto until they reached the precinct station.

GUSTAFSON *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 71–1669. Argued October 9, 1973—Decided December 11, 1973

During the course of a patdown search of the person of petitioner, who had been arrested for not having his driver's license in his possession, the arresting officer seized marihuana cigarettes, for the unlawful possession of which petitioner was subsequently tried and convicted. The State Supreme Court upheld the conviction, concluding that the search leading to the discovery of the marihuana, which was used as evidence in petitioner's trial, was not unreasonable.

Held: The full search of the person of the suspect made incident to a lawful custodial arrest did not violate the Fourth and Fourteenth Amendments, *United States* v. *Robinson, ante,* p. 218, and it is of no constitutional significance that, contrary to the situation in *Robinson,* police regulations did not require that petitioner be taken into custody or establish the conditions under which a full-scale body search should be conducted, nor, as in *Robinson,* is it relevant that the arresting officer had no subjective fear of petitioner or suspicion that he was armed, since it is the fact of custodial arrest that gives rise to the authority to search. Pp. 263–266.

258 So. 2d 1, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., *post,* p. 266, and POWELL, J., *ante,* p. 237, filed concurring opinions. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 267.

James M. Russ argued the cause for petitioner. With him on the brief was *Michael F. Cycmanick.*

Barry Scott Richard, Deputy Attorney General of Florida, argued the cause for respondent. On the brief were *Robert L. Shevin,* Attorney General, and *Nelson E.*

Bailey and *C. Marie Bernard,* Assistant Attorneys General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner James Gustafson was convicted in a Florida trial court for unlawful possession of marihuana. At his trial the State introduced into evidence marihuana which had been seized from him during a search incident to his arrest on a charge of driving without possession of an operator's license. The District Court of Appeal of Florida, Fourth District, reversed petitioner's conviction, holding that the search which had led to the discovery of the marihuana was unreasonable under the Fourth and Fourteenth Amendments. 243 So. 2d 615 (1971). The Supreme Court of Florida in turn reversed that decision, 258 So. 2d 1 (1972), and petitioner sought certiorari in this Court. We granted certiorari, 410 U. S. 982 (1073), and set the case for argument with No. 72–936, *United States* v. *Robinson,* also decided today, *ante,* p. 218. For the reasons set forth below, we affirm the judgment of the Supreme Court of Florida.

At approximately 2 a. m., on January 12, 1969, Lieutenant Paul R. Smith, a uniformed municipal police officer of Eau Gallie, Florida, was on a routine patrol in an unmarked squad car when he observed a 1953 white Cadillac, bearing New York license plates, driving

*Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *William E. James,* Assistant Attorney General, and *Robert R. Granucci* and *Sanford Svetcov,* Deputy Attorneys General, for the State of California, and by *William J. Scott,* Attorney General, and *James B. Zagel* and *Jayne A. Carr,* Assistant Attorneys General, for the State of Illinois.

south through the town. Smith observed the automobile weave across the center line and back to the right side of the road "three or four" times. Smith testified that he observed the two occupants of the Cadillac look back; after they apparently saw the squad car, the car drove across the highway and behind a grocery store, and then headed south on another city street.

At that point Smith turned on his flashing light and ordered the Cadillac over to the side of the road. After stopping the vehicle, Smith asked petitioner, the driver, to produce his operator's license. Petitioner informed Smith that he was a student and that he had left his operator's license in his dormitory room in the neighboring city of Melbourne, Florida. Petitioner was then placed under arrest for failure to have his vehicle operator's license in his possession. It was conceded by the parties below and in this Court that the officer had probable cause to arrest upon learning that petitioner did not have his license in his possession, and that he took petitioner into custody in order to transport him to the stationhouse for further inquiry.[1]

Smith then proceeded to search the petitioner's person. Smith testified that he patted down the clothing of the petitioner, "outside and inside, I checked the belt, the shirt pockets and all around the belt, completely around inside." Upon completing his patdown, he testified, he placed his hand into the left front coat pocket of the coat petitioner was wearing. From that pocket he extracted a "long chain" and a Benson and Hedges cigarette box. Smith testified that he then "opened [the cigarette box] and it appeared there were marihuana cigarettes in the box.[2] I had been shown this in training

[1] Brief for Petitioner 9.

[2] Upon placing petitioner under arrest for driving without possession of an operator's license and after removing the chain and the cigarette box from petitioner's clothing, Smith told the assisting

at the police department and these appeared to be marihuana to me."

I

Petitioner urges that there could be no evidentiary purpose for the search conducted by Smith, and therefore the authority to search for weapons incident to a lawful arrest is controlled by the standards laid down in *Terry* v. *Ohio,* 392 U. S. 1 (1968). Petitioner contends that this case is different from *United States* v. *Robinson, ante,* p. 218, in that petitioner had experienced no previous encounters with the officer in this case, and the offense for which he was arrested was "benign or trivial in nature," carrying with it no mandatory minimum sentence as did the offense for which Robinson was arrested. Petitioner points out that here, unlike *Robinson,* there were no police regulations which required the officer to take petitioner into custody, nor were there police department policies requiring full-scale body searches upon arrest in the field. Petitioner also points to the fact that here, as in *Robinson,* the officer expressed no fear for his own well-being or for that of others in dealing with the petitioner.

We have held today in *United States* v. *Robinson* that "[i]t is the fact of the lawful arrest which establishes the

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officer on the scene to check the other passenger of the Cadillac to see if he had an operator's permit so that he could drive the car to the station. Smith then put petitioner in the back seat of the squad car. Smith then opened the cigarette box and observed the rolled cigarettes he believed to be marihuana. He then told the other officer to place the other passenger in the squad car so that he could also be transported to the station, for the purpose of investigation. The passenger was frisked by the other officer and placed in the squad car; no charges were placed against the passenger. In addition to the marihuana conviction which we here review, petitioner was charged with driving without possession of an operator's license; that charge was dropped when petitioner produced a valid operator's license at a later date.

authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Ante,* at 235. Our decision in *Robinson* indicates that the limitations placed by *Terry* v. *Ohio, supra,* on protective searches conducted in an investigatory stop situation based on less than probable cause are not to be carried over to searches made incident to lawful custodial arrests. We stated in *Robinson:*

> "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. *Agnello* v. *United States,* 269 U. S. 20 (1925); *Abel* v. *United States,* 362 U. S. 217 (1960). The standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." *Ante,* at 234.

Neither *Chimel* v. *California,* 395 U. S. 752 (1969), nor *Peters* v. *New York,* 392 U. S. 40 (1968), relied upon by petitioner, purported to limit the traditional authority of the arresting officer to conduct a full search of the person of an arrestee incident to a lawful custodial arrest. *United States* v. *Robinson, ante,* at 225–226, 228–229. Indeed, as our decision in *Robinson* indicates, not only has this been established Fourth Amendment law since the decision in *Weeks* v. *United States,* 232 U. S. 383 (1914), but it was also the rule both at common law and in the early development of American law. *United States* v. *Robinson, ante,* at 230–233.

Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson*, and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. *Id.*, at 223 n. 2.[3] It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody. In addition, as our decision in *Robinson* makes clear, the arguable absence of "evidentiary" purpose for a search incident to a lawful arrest is not controlling. *Id.*, at 233.[4] "The authority to search the person incident to a lawful custodial arrest, while based upon the need

[3] Smith testified that he wrote about eight to 10 traffic citations per week, and that about three or four out of every 10 persons he arrested for the offense of driving without a license were taken into custody to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gallie. Finally, Smith testified that after making a custodial arrest, he always searches the arrestee before placing him into the patrol car.

[4] The State of Florida argues in this Court that there was an evidentiary purpose for the search of petitioner. It is contended that Smith's observation of the erratic motions of the car that petitioner was driving created a reasonable suspicion that the petitioner may have been under the influence of some intoxicant. Upon confronting petitioner after stopping the car, Smith indicated that he noticed that the petitioner's eyes were "bleary." The State argues that the officer had probable cause to arrest the petitioner for driving while intoxicated, and that Smith thought Gustafson was intoxicated when he confronted him. Since Smith did not detect an odor of alcohol during that confrontation, the State argues it was reasonable for the officer to search the petitioner's person for drugs that may have been the cause of the suspected intoxication. Florida makes it a criminal offense to drive while intoxicated not only by alcohol, but also by unlawful drugs. Fla. Stat. Ann. § 317.201 (1968).

to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.*, at 235.

II

We hold, therefore, that upon arresting petitioner for the offense of driving his automobile without possession of a valid operator's license, and taking him into custody, Smith was entitled to make a full search of petitioner's person incident to that lawful arrest. Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Smith did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed. Having in the course of his lawful search come upon the box of cigarettes, Smith was entitled to inspect it; and when his inspection revealed the homemade cigarettes which he believed to contain an unlawful substance, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct. *Harris* v. *United States*, 331 U. S. 145, 154–155 (1947); *Warden* v. *Hayden*, 387 U. S. 294, 299, 307 (1967); *Adams* v. *Williams*, 407 U. S. 143, 149 (1972); *United States* v. *Robinson*, *ante*, at 236. The judgment of the Supreme Court of Florida is therefore

Affirmed.

[For concurring opinion of MR. JUSTICE POWELL, see *ante*, p. 237.]

MR. JUSTICE STEWART, concurring.

It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights

under the Fourth and Fourteenth Amendments. But no such claim has been made. Instead, the petitioner has fully conceded the constitutional validity of his custodial arrest. That being so, it follows that the incidental search of his person was also constitutionally valid. To hold otherwise would, as the Court makes clear in this case and in *United States* v. *Robinson, ante,* p. 218, mark an abrupt departure from settled constitutional precedent.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I respectfully dissent for the reasons stated in my opinion in *United States* v. *Robinson, ante,* p. 238. The facts show that after arresting petitioner Gustafson for driving without possession of an operator's license, Officer Smith conducted a search of petitioner's person in which he removed a Benson and Hedges cigarette box. The officer put petitioner in the back seat of the squad car and then opened the cigarette box, disclosing marihuana cigarettes. As my Brother STEWART indicates, *ante,* at 266 and this page, no challenge was made either here or below with respect to the lawfulness of Officer Smith's decision to effect a full custodial arrest for this minor traffic offense. Whether or not it was lawful for the officer to have searched petitioner's person and removed the cigarette package before placing petitioner in the squad car, see *United States* v. *Robinson, ante,* at 250–255 (MARSHALL, J., dissenting), there was no justification for his opening the package and looking inside.

There was no reason to believe, and Officer Smith did not in fact believe, that petitioner was a dangerous person or that the package contained a weapon. The package's weight alone no doubt would have indicated that it did not contain a gun or knife. In any event,

even were it possible that the package contained some sort of weapon—say a razor blade—there was no chance the petitioner could use it once it was in the officer's hands. The opening of the package had no connection whatsoever with the protective purpose of the search.

The State argues, and the Florida Supreme Court found, see 258 So. 2d 1, 2 (1972), that Officer Smith had a reasonable suspicion petitioner was intoxicated, justifying searching for intoxicating drugs such as marihuana. Leaving aside the question whether the officer could search for intoxicants, absent probable cause that petitioner had committed an offense involving intoxication, I do not find sufficient evidence in this record to support the conclusion that Officer Smith even had a reasonable suspicion petitioner was intoxicated. To begin with, Officer Smith neither arrested petitioner for driving while intoxicated nor did he give petitioner a sobriety test. See Fla. Stat. Ann. §§ 322.261 and 322.262 (1968). Smith testified that petitioner did not have any trouble getting out of his car, did not have difficulty standing up, and did not slur his speech when answering the officer's questions. Nor did the fact that petitioner's car weaved across a lane justify such a suspicion. As Officer Smith testified, he did not arrest petitioner on a careless-driving-by-weaving charge because there was simply not enough evidence. If there was not enough evidence to justify a charge for the weaving itself, I find it hard to understand how there could be enough evidence to suspect that petitioner was intoxicated. Officer Smith testified that petitioner's eyes looked bleary, but that was hardly surprising, since the arrest took place at 2 a. m.

The only need for a search in this case was to disarm petitioner to protect Officer Smith from harm while the two were together in the patrol car. The search con-

ducted by Officer Smith went far beyond what was reasonably necessary to achieve that end. It therefore fell outside the scope of a properly drawn "search incident to arrest" exception to the Fourth Amendment's warrant requirement. I would reverse the judgment of the Florida Supreme Court holding that the fruits of the search could be admitted at petitioner's trial.

NATIONAL LABOR RELATIONS BOARD *v.* SAVAIR MANUFACTURING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1231. Argued November 12, 1973—
Decided December 17, 1973

A labor union's offer to waive initiation fees for all employees who sign union authorization cards before a certification election under the National Labor Relations Act interferes with the employees' right to refrain from union activities guaranteed by § 7 of the Act; does not comport with the principle of "fair and free choice of bargaining representatives by employees" that is inherent in § 9 (c) (1)(A), *NLRB* v. *Tower Co.*, 329 U. S. 324; and is ground for denying enforcement of an order against the employer to bargain with the union after it wins the election. Pp. 275–281.

470 F. 2d 305, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 281.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Samuel Huntington, Peter G. Nash, John S. Irving, Patrick Hardin,* and *Linda Sher.*

Robert J. Solner argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The National Labor Relations Board, acting pursuant to § 9 (c) of the National Labor Relations Act, as

amended, 61 Stat. 144,[1] 29 U. S. C. § 159 (c), conducted an election by secret ballot among the production and maintenance employees of respondent at the request of the Mechanics Educational Society of America (hereafter Union). Under the Act[2] the Union, if it wins the election, becomes "the exclusive representative of all the employees" in that particular unit for purposes of collective bargaining. The Union won the election by a vote of 22–20.

Respondent filed objections to the election, but after an evidentiary hearing, a hearing officer found against respondent and the Board certified the Union as the representative of the employees in that unit. Respondent, however, refused to bargain. The Union thereupon filed

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[1] Section 9 (c) (1) (A) provides in part:

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in [§ 9 (a)] . . .

. . . . . .

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." 29 U. S. C. § 159 (c).

[2] Section 9 (a) provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U. S. C. § 159 (a).

an unfair labor practice charge with the General Counsel, who issued a complaint alleging that respondent had violated §§ 8 (a)(1) and (5) of the Act.[3] The Board sustained the allegations and ordered respondent to bargain with the Union. 194 N. L. R. B. 298. The Court of Appeals denied enforcement of the order. 470 F. 2d 305. We granted the petition for certiorari, 411 U. S. 964, there apparently being a conflict between this decision in the Sixth Circuit and a decision in the Eighth Circuit, *NLRB* v. *DIT-MCO, Inc.*, 428 F. 2d 775, and also with one in the Ninth Circuit, *NLRB* v. *G. K. Turner Associates*, 457 F. 2d 484. We affirm.

It appeared that prior to the election, "recognition slips" were circulated among employees. An employee who signed the slip before the election [4] became a mem-

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[3] Sections 8 (a)(1) and (5) provide:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7];

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9 (a)]." 29 U. S. C. §§ 158 (a)(1) and (5).

[4] The question for review presented by the Board is whether the "Board properly concluded that a union's offer to waive initiation fees for all employees who sign union authorization cards *before a Board representation election*, if the union wins the election, does not tend to interfere with employee free choice in the election." (Emphasis added.) There was testimony by Alfred Smith, National Secretary-Treasurer of the Union, that he told the employees at a meeting that the waiver of initiation fees was open to all who signed the authorization cards before the collective-bargaining contract was signed.

The Hearing Officer, however, found that

"Bridgeman further testified that subsequent to that meeting, and prior to the election, Bennie McKnight told employees that if they signed the union membership and authorization card *before the*

ber of the Union and would not have to pay what at times was called an "initiation fee" and at times a "fine." If the Union was voted in, those who had not signed a recognition slip would have to pay.

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election, there would be no union 'initiation fee' if the union were successful at the election." (Emphasis added.)

While Bridgeman's testimony about McKnight's representations after the meeting might have been only implicit, the Hearing Officer also referred to Bridgeman's testimony that Smith himself had stated at the meeting that waiver of the initiation fee would be limited to those signing up before the election. The Hearing Officer clearly proceeded on the premise that the waiver was open only to those who signed up before the election:

"The Employer further argues that it is an economic inducement contingent upon how employees vote in the election and on the results of the election, and as such, constitutes an objectionable inducement. This argument, however, has been rejected by the Board. In the *DIT-MCO, Inc.*, 163 N. L. R. B. No. 147 case [p. 1019], the Board held that a provisional waiver of initiation fees prior to election is not improper regardless of whether it is contingent upon the results of the election. The Board pointed out that it would be unreasonable to conclude that a statement by the union during an election to the effect that an assessment of money or an obligation to pay money *which could be avoided by the execution of a union membership card prior to the election,* would influence a vote in favor of the Union when the simplest way to avoid the incurrence of any financial obligation would be to vote 'no.' Thus, it would appear that any threat to impose a 'fine,' 'assessment' or 'initiation fee,' or 'payment to join the union,' *although it may induce an employee to execute a union authorization membership card, would more probably induce him to vote 'no' at the election.*" (Emphasis added.)

The Court of Appeals read the Hearing Officer's Report to state that the waiver was limited to those signing up before the election, as do we. Such a reading is amply supported by the evidence in the record beyond the testimony to which we have already alluded. The record demonstrates the pressure which employees felt to sign up with the Union quickly, before the election and perhaps even before the representation petition itself was filed, a pressure utterly inconsistent with a belief that a waiver would be available

The actual solicitation of signatures on the "recognition slips" was not done by Union officials. Union officials, however, explained to employees at meetings that those who signed the slips would not be required to pay an initiation fee, while those who did not would have to pay. Those officials also picked out some five employees to do the soliciting and authorized them to explain the Union's initiation-fee policy. Those solicited were told that there would be no initiation fee charged those who signed the slip before the election. Under the bylaws of the Union, an initiation fee apparently was not to be higher than $10; but the employees who testified at the hearing (1) did not know how large the fee would be and (2) said that their understanding was that the fee was a "fine" or "assessment."

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to them up to the time a collective-bargaining agreement was signed after the election. It is also supported by the fact that 28 individuals signed up with the Union before the election petition was filed with the Board on August 12, 1970, and apparently an additional seven or eight signed up before the September 22, 1970, election. But there is no indication of any individuals signing up with the Union after the election, which would be the obviously rational decision once the Union had won the election.

The Board argues that unions have a valid interest in waiving the initiation fee when the union has not yet been chosen as a bargaining representative, because "'[e]mployees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them. Waiver of the [initiation fees] would remove this artificial obstacle to their endorsement of the union.'" See *Amalgamated Clothing Workers* v. *NLRB*, 345 F. 2d 264, 268 (CA2 1969). While this union interest is legitimate, the Board's argument ignores the fact that this interest can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election. The limitation imposed by the Union in this case—to those joining before the election—is necessary only because it serves the additional purpose of affecting the Union organizational campaign and the election.

One employee, Donald Bridgeman, testified that he signed the slip to avoid paying the "fine" if the Union won. He got the message directly from an employee picked by the Union to solicit signatures on the "slips." So did Thomas Rice, another employee.

The Board originally took the position that pre-election solicitation of memberships by a union with a promise to waive the initiation fee of the union was not consistent with a fair and free choice of bargaining representatives. *Lobue Bros.*, 109 N. L. R. B. 1182. Later in *DIT–MCO, Inc.*, 163 N. L. R. B. 1019, the Board explained its changed position as follows:

> "We shall assume, *arguendo,* that employees who sign cards when offered a waiver of initiation fees do so solely because no cost is thus involved; that they in fact do not at that point really want the union to be their bargaining representative. The error of the *Lobue* premise can be readily seen upon a review of the consequences of such employees casting votes for or against union representation. Initially, it is obvious that employees who have received or been promised free memberships will not be required to pay an initiation fee, *whatever the outcome of the vote.* If the union wins the election, there is by postulate no obligation; and if the union loses, *there is still no obligation,* because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus, whatever kindly feeling toward the union may be generated by the cost-reduction offer, when consideration is given only to the question of initiation fees, it is completely illogical to characterize as improper inducement or coercion to

vote 'Yes' a waiver of something that can be avoided simply by voting 'No.'

"The illogic of *Lobue* does not become any more logical when other consequences of a vote for representation are considered. Thus, employees know that if a majority vote for the union, it will be their exclusive representative, and, provided a valid union-security provision is negotiated, they will be obliged to pay dues as a condition of employment. Thus, viewed solely as a financial matter, a 'no' vote will help to avoid any subsequent obligations, a 'yes' may well help to incur such obligations. In these circumstances, an employee who did not want the union to represent him would hardly be likely to vote for the union just because there would be no initial cost involved in obtaining membership. Since an election resulting in the union's defeat would entail not only no initial cost, but also insure that no dues would have to be paid as a condition of employment, the financial inducement, if a factor at all, would be in the direction of a vote against the union, rather than for it." *Id.*, at 1021–1022.

We are asked to respect the expertise of the Board on this issue, giving it leeway to alter or modify its policy in light of its ongoing experience with the problem. The difficulty is not in that principle but with the standards to govern the conduct of elections under § 9 (c)(1)(A). We said in *NLRB* v. *Tower Co.*, 329 U. S. 324, 330, that the duty of the Board was to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."

It is, of course, true as we said in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767, that "Congress granted the Board a wide discretion to ensure the fair and

free choice of bargaining representatives." See also *NLRB* v. *Waterman S. S. Co.*, 309 U. S. 206, 226. But in this case two opposed groups are in contention: one composed of those who want a union and the other, of those who prefer not to have one. The Board in its *DIT–MCO* opinion says "it is completely illogical to characterize as improper inducement or coercion" a waiver of initiation fees for those who vote "yes" when the whole problem can be avoided by voting "no." 163 N. L. R. B., at 1021–1022. But the Board's analysis ignores the realities of the situation.

Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their coworkers' views on the unionization issue. By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.

That influence may well have been felt here for, as noted,[5] there were 28 who signed up with the Union before the election petition was filed with the Board and either seven or eight more who signed up before the election. We do not believe that the statutory policy of fair elections prescribed in the *Tower* case permits endorsements, whether for or against the union, to be bought and sold in this fashion.

In addition, while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal

[5] See n. 4, *supra*.

sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union. And on the facts of this case, the change of just one vote would have resulted in a 21–21 election rather than a 22–20 election.

Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities." 29 U. S. C. § 157. An employer who promises to increase the fringe benefits by $10 for each employee who votes against the union, if the union loses the election, would cross the forbidden line under our decisions. See *NLRB* v. *Exchange Parts Co.*, 375 U. S. 405. The right of employees to "form, join, or assist" labor unions guaranteed by § 7 has an express sanction in § 8 (a)(1) which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of those rights. 29 U. S. C. §§ 157, 158 (a)(1). Such interference is an unfair labor practice as we held in *NLRB* v. *Exchange Parts Co., supra.* But, as already noted, § 7 guarantees the right of employees "to refrain from any or all of such activities."

Congress has also listed in § 8 (b) of the Act "unfair" labor practices of unions. 29 U. S. C. § 158 (b). There is no explicit provision which makes "interference" by a union with the right of an employee to "refrain" from union activities an unfair labor practice.

Section 8 (c), however, provides:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, *if such expression contains no threat*

of reprisal or force or promise of benefit." 29 U. S. C. § 158 (c) (emphasis added).

Whether it would be an "unfair" labor practice for a union to promise a special benefit to those who sign up for a union seems not to have been squarely resolved.[6] The right of a free choice is, however, inherent in the principles reflected in § 9 (c)(1)(A).

When the dissent says that "[t]he special inducement is to sign the card, not to vote for the union" and that treating the two choices as one is untenable, it overlooks cases like *NLRB* v. *Gissel Packing Co.*, 395 U. S.

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[6] The lower courts have recognized that promising benefits or conferring benefits before representation elections may unduly influence the representational choices of employees where the offer is not across the board to all employees but, as here, only to those who sign up prior to the election. See, *e. g.*, *NLRB* v. *Gorbea, Perez & Morell*, 328 F. 2d 679, 681–682 and nn. 6–7 (CA1 1964) (promise to waive initiation fee for those joining union prior to election, but not after, may substantially influence election); *Amalgamated Clothing Workers* v. *NLRB*, 345 F. 2d, at 268–269 (Friendly, J., concurring) (improper to waive fees for those joining union immediately while indicating that this is foreclosed to those joining later). See also *Collins & Aikman Corp.* v. *NLRB*, 383 F. 2d 722, 728–729 (CA4 1967) (paying employee $7 to be observer at election is an "unreasonable or excessive economic inducement" potentially influencing other employees and is ground to set aside election); *NLRB* v. *Commercial Letter, Inc.*, 455 F. 2d 109 (CA8 1972) (disproportionate payments to employees attending union "hearings" prior to representation election).

The NLRB itself has recognized in other contexts that promising or conferring benefits may unduly influence representation elections. See *e. g.*, *Wagner Electric Corp.*, 167 N. L. R. B. 532, 533 (grant of life insurance policy to those who signed with union before representation election "subjects the donees to a constraint to vote for the donor union"); *General Cable Corp.*, 170 N. L. R. B. 1682 ($5 gift to employees by union before election, even when not conditioned on outcome of election, was inducement to cast ballots favorable to union); *Teletype Corp.*, 122 N. L. R. B. 1594 (payment of money by rival unions to those attending pre-election meetings).

575. There we held that the gathering of authorization cards from a majority of the employees in the bargaining unit may entitle the union to represent the employees for collective-bargaining purposes, even though there has been and will be no election, *id.*, at 582–583, and that rejection of that authorization by the employer is an unfair labor practice. Where the solicitation of cards is represented as being solely for the purpose of obtaining an election, a contrary result is indicated. *Id.*, at 584, 606. Thus the solicitation of authorization cards may serve one of two ends. Of course, when an election is contemplated, an employee does not become a member of the union merely by signing a card. But prior to the election if the union receives overwhelming support, the pro-union group may decide to treat the union authorization cards as authorizing it to conduct collective bargaining without an election. The latent potential of that alternative use of authorization cards cautions us to treat the solicitation of authorization cards in exchange for consideration of fringe benefits granted by the union as a separate step protected by the same kind of moral standard that governs elections themselves.

The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union.

In the *Exchange Parts* case we said that, although the benefits granted by the employer were permanent and unconditional, employees were "not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." 375 U. S., at 409. If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign towards their antagonists whether they be nonunion

protagonists or the employer. The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win. That influence may well have had a decisive impact in this case where a change of one vote would have changed the result.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

The report of the Hearing Officer, filed in response to the Company's objections to the election, reveals that prior to the filing of the representation petition, a union organizer had told employees that, if the Union won the election, they would be subject to an initiation fee or "fine" if they did not sign an authorization card. The Union was then engaged in securing the necessary 30% showing of union support which would entitle it to hold an election under the Labor Board's rules. 29 CFR §§ 101.17, 101.18 (1973). The officer concluded that there was "insufficient evidence . . . that a threat of a 'fine' occurred either before or after the filing date of the petition." In any event, he also concluded that conduct occurring before the filing of an election petition was not ground for setting aside the election since "[w]hether or not a sufficient valid showing of interest was obtained, constitutes a matter for administrative determination." Cf. *Goodyear Tire & Rubber Co.*, 138 N. L. R. B. 453 (1962).[1]

After the representation petition was filed and the election campaign proper commenced, the Union's Sec-

[1] The opinion for the Court places no special emphasis on the fact that the waiver of initiation fees may have been referred to as a "fine." Since the Hearing Officer expressly found that no such representation was made, the matter deserves no further attention.

retary-Treasurer, Alfred Smith, addressed a group of about 20 employees at an organization meeting. In response to a question about the initiation fee, Smith indicated that there was "a small fee" which would be waived for all employees who signed cards prior to the election.[2] The fee was, in fact, $10. Qualification for fee waiver was obtained by signing membership cards, but the testimony indicated that no one incurred any obligation to the Union until and unless the Union became the bargaining agent and a collective contract was signed. The Hearing Officer found "no evidence, nor any contention, that the Union misrepresented to employees that they would have to become members immediately upon the certification of the union as bargaining agent."

On this record, the Board, obviously relying on its decision in *DIT–MCO, Inc.*, 163 N. L. R. B. 1019 (1967), enforced, 428 F. 2d 775 (CA8 1970), which overruled its prior decision in *Lobue Bros.*, 109 N. L. R. B. 1182 (1954), ordered the employer to bargain with the Union. 194 N. L. R. B. 298 (1971). The Sixth Circuit denied enforcement of the order, 470 F. 2d 305 (1972), and the majority now affirms that judgment.

Because in my view the Labor Board has "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB* v. *Tower Co.*, 329 U. S. 324, 330 (1946), and because I am unpersuaded that the waiver of initiation fees in this case is so clearly coercive within § 7 of the National Labor Relations Act that the Board has abused its discretion in finding otherwise, I respectfully dissent.

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[2] Mr. Bridgeman, an employee who attended the meeting, testified that his brother asked Smith if there was a fee for joining the union. Mr. Smith's answer was "[t]here would be a small fee." App. 28.

I

It is well established that an "unconditional" offer to waive initiation fees, where the waiver offer is left open for some period of time after the election, is not coercive and does not constitute an unfair labor practice. The Sixth Circuit itself has so held, *NLRB* v. *Gafner Automotive & Machine, Inc.*, 400 F. 2d 10 (1968), and other courts of appeals have reached the same result. *Amalgamated Clothing Workers* v. *NLRB*, 345 F. 2d 264 (CA2 1965); *NLRB* v. *Crest Leather Mfg. Corp.*, 414 F. 2d 421 (CA5 1969). The existence of the initiation fee is created by the union and represents a self-imposed barrier to entry.[3] There is no evidence that the fee is normally imposed for the sole purpose of removing it during a labor campaign. A different case might be put if the union purported to remove a nonexistent fee or artificially inflated the fee so as to misrepresent the benefit tendered by its removal. See *NLRB* v. *Gorbea, Perez & Morell*, 328 F. 2d 679 (CA1 1964). Similarly, it is established that the union can promise employees to obtain wage increases or other benefits if it is elected as a bargaining representative. *Wilson Athletic Goods Mfg. Co.* v. *NLRB*, 164 F. 2d 637 (CA7 1947).

It must be obvious that these waivers of fees are a form of economic inducement, as the opinion for the Court employs that term. Undoubtedly an offer to reduce the cost of joining the union makes the union a

[3] The role of the initiation fee has been described by one writer as follows: "Initiation fees serve several sorts of union purposes. First, of course, they are a source of revenue, which is occasionally expendable however during an organization drive when the union is anxious to induce workers to join the union. Second, the initiation fee represents for the older member a kind of equity payment by the new member to compensate, at least partially, for the efforts that others have put into building the union. . . ." J. Barbash, The Practice of Unionism 79 (1956).

more attractive possibility and may influence an employee to vote for the union, though one would assume, in view of the other costs and benefits at stake, that this consideration will be marginal. Similarly, if the union represents to the employees that it will attempt to secure higher wages, an employee's calculations of costs and benefits will be altered, but in that instance the union is merely stating the obvious; indeed, the promise of higher wages is the primary rationale for the existence of the union. In any event, these forms of inducement are valid.

In the instant case, an offer which by its terms expires with the conclusion of the election is also a form of economic inducement. But insofar as the offer might affect the calculation of costs and benefits of joining the union, its effect is the same as an offer which does not expire until some time after the election. The inability to distinguish between these two situations, at least where small fees are involved and where the sole source of concern is pure financial inducement, led the Board to conclude in *DIT–MCO* that "an employee who did not want the union to represent him would hardly be likely to vote for the union just because there would be no initial cost involved in obtaining membership." 163 N. L. R. B., at 1022.

The majority places heavy reliance on the supposed analogy between the waiver of fees in this case and an actual increase in benefits made by an employer during the course of an election campaign. *NLRB* v. *Exchange Parts Co.*, 375 U. S. 405 (1964). There the employer increased vacation-pay benefits during the course of the campaign. The Court agreed with the Board that this was coercive activity on the part of the employer, and accordingly reversed the Court of Appeals, and ordered enforcement of the Board's order. It was stated that

"[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove." *Id.*, at 409. A number of important differences exist between that case and the instant one. First, the employer actually gave his employees substantial increased benefits, whereas here the benefit is only contingent and small; the union glove is not very velvet. Secondly, in the union context, the fist is missing. When the employer increased benefits, the threat was made "that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Ibid.* The Union, on the other hand, since it was not the representative of the employees, and would not be if it were unsuccessful in the election, could not make the same threat by offering a benefit which it would take away if it *lost* the election. A union can only make its own victory more desirable in the minds of the employees.[4]

II

If pure economic inducement in the form of lowering anticipated costs of joining the union is not to be con-

[4] The Court cannot ignore the fact, as well, that § 1 of the National Labor Relations Act declared the congressional policy of "encouraging the practice and procedure of collective bargaining." 29 U. S. C. § 151. The existence of unions is an inescapable corollary of this preference. To the extent that this Court prohibits the union from promising a fairer deal for unionized employees by describing the benefits to be obtained by unionization, this policy is seriously eroded. This Court has often underscored this preference in the Act. See, *e. g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 182 (1941); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180 (1967). This preference is only one of opportunity and the free choice of the employee must be protected, but restrictions on the communications of the union as to potential benefits may unduly prevent the intelligent exercise of such choice. The employer may garner loyalty through his actions and record of past performance for his own employees; the union can only sell employees the future.

sidered coercive, one must focus on the special dangers, if any, presented by the conditional offer, an analysis not undertaken by the majority. It has been proposed that the conditional offer is specially to be proscribed because of the interjection of a new consideration into the voting choice of an employee: how probable it is that the union will win or lose the election. *NLRB* v. *Gafner Automotive & Machine, Inc.*, 400 F. 2d, at 13 (Phillips, J., concurring); *Amalgamated Clothing Workers* v. *NLRB*, 345 F. 2d, at 268 (Friendly, J., concurring). The argument might be that an employee who estimates that the costs of joining the union exceed the benefits, even taking into account the reduced initiation fees available by signing a card, will still sign the card, as a hedge, because of his prediction that the union will win the election.[5] A statement of the theory carries with it its own disproof. The special inducement is to sign the card, not to vote for the union. The majority decision collapses these two choices into one, and is thus untenable. The majority assumes, contrary to fact, that the employee has joined the Union by signing the authorization card. This is only true, however, if the Union wins the election and signs a collective contract, and the employee can still seek to prevent that outcome by cast-

[5] This possibility of hedging is to some extent borne out by the record. Although the Court cannot know what the correlation was between signed cards and votes for the Union, we do know that not everyone who signed cards voted for the Union. Twenty-eight persons plus signed cards (App. 75) and only 22 voted for the Union. Moreover, there is testimony that some employees discussed the hedge. "Of course some of us fellows did say to other fellows that were really against it [the Union] and *have always been against it* you better sign your ticket and turn it in because if you didn't if it does get voted in, if the majority of the men vote the union in, at least you have to pay your dues which is very natural but you wouldn't have to pay no initiation fee." App. 28–29. (Emphasis added.)

ing his vote against the Union in a secret ballot. The testimony was clear that if the Union loses the election, the employee who signs the card incurs no obligation to the Union. The expressed preference in the National Labor Relations Act for secret ballot elections assumes that voters may act differently in private than in public, and ordinarily guarantees to employees the ability to make a secret choice. It is, therefore, important to highlight the fact that the Board in *DIT–MCO* assumed, *arguendo*, "that employees who sign cards when offered a waiver of initiation fees do so solely because no cost is thus involved; that they in fact do not at that point really want the union to be their bargaining representative." 163 N. L. R. B., at 1021.

There is no need to consider here, as does the majority, whether the Union could achieve recognition on the basis of authorization cards secured, in part, by an offer of fee waiver. Of course, a card majority cannot serve as a basis for a § 8 (a)(5) bargaining order under *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 614–616 (1969), unless the employer has committed serious unfair labor practices. It may be that even given a serious unfair labor practice on the part of the employer, these cards could not serve as a basis for recognition. In this case, however, the Board's bargaining order was based on the vote of a secret ballot election, and the Court must supply the connective between the decision to sign a card and the decision to vote for the Union.[6]

[6] As to the possible effect of the fee waiver offer on securing the 30% showing necessary for holding an election, whether or not there is a valid showing is a matter for administrative determination not subject to litigation by the parties. *Goodyear Tire & Rubber Co.*, 138 N. L. R. B. 453 (1962). Courts of appeals have uniformly so held. See *NLRB* v. *J. I. Case Co.*, 201 F. 2d 597 (CA9 1953); *NLRB* v. *White Constr. & Eng. Co.*, 204 F. 2d 950, 953 (CA5 1953); *Kearney & Trecker Corp.* v. *NLRB*, 209 F. 2d 782, 787–788 (CA7

This connective can only be supplied by some rather speculative counter-rational psychological assumptions, *i. e.*, that a person who signs the card *will* vote for the union.[7] The Board assumes that such is not the case, and I am not prepared to upset the Board's judgment on this matter.[8] The majority opinion stresses the fact that the margin of Union victory was only two

1953); *NLRB* v. *National Truck Rental Co.*, 99 U. S. App. D. C. 259, 261–262, 239 F. 2d 422, 424–425 (1956) (Burger, J.), cert. denied, 352 U. S. 1016 (1957); *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922, 926–927 (CA6 1967); *Intertype Co.* v. *NLRB*, 401 F. 2d 41, 43 (CA4 1968), cert. denied, 393 U. S. 1049 (1969).

[7] It is certainly arguable that such a connection can be made when the union pays a person cash to vote for or assist the union. The benefit of the union has been tendered and the employee may well feel he has incurred a moral obligation to vote for the union. See, *e. g.*, *Wagner Electric Corp.*, 167 N. L. R. B. 532, 533 (1967) (grant of life insurance policy to those who signed with union before representation election "subjects the donees to a constraint to vote for the donor union"). See also *Collins & Aikman Corp.* v. *NLRB*, 383 F. 2d 722 (CA4 1967) (payment of $7 to employee to be observer at election); *NLRB* v. *Commercial Letter, Inc.*, 455 F. 2d 109 (CA8 1972) (excessive payments to union members to attend meetings). In *Wagner, supra*, the Board distinguished the initiation fee decision in *DIT-MCO, Inc.*, 163 N. L. R. B. 1019 (1967), on the ground that there was no immediate improvement in an employee's economic situation when fees were waived.

[8] The majority in its conclusion seems to articulate still another theory of coercion: "The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win." This theory, of course, assumes a card signer will vote for the union. Moreover, this problem is fundamental in labor elections, at the outset, when cards are collected for the purpose of holding an election pursuant to the necessary showing of support, and, at the conclusion, if the union wins, when those who oppose the union must still decide to join the union or face the union's wrath. One could easily argue that at least an equal deterrent to signing the card is the wrathful employer if the union *loses* the election.

votes, and thus suggests that the "psychological connective" may explain the outcome indicating that it "*may well have* had a decisive impact" (emphasis added). But there is no evidence to this effect, and definitions of unfair practices which become a function of the outcome of an election are subject to severe problems of administration. The Board, in my judgment, is entitled to regulate elections on standard theories of coercion.

III

Since the case for coercion arising out of the conditional offer is speculative, and since the alteration of the calculus of costs and benefits is marginal where a small fee is involved, the issue here resolves into the proper allocation of institutional responsibility between an administrative agency and a reviewing court. The Board, upon reflection and study, has concluded that the conditional offer is not coercive within the meaning of § 7. This represented a basic change in policy but "one of the signal attributes of the administrative process is flexibility in reconsidering and reforming of policy." *City of Chicago* v. *FPC*, 128 U. S. App. D. C. 107, 115, 385 F. 2d 629, 637 (1967). Such revisions are especially likely in the regulation of labor elections, due to the substantial problems in deciding what is likely to interfere with employee free choice. See Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 44–45 (1964).

While the invocation of agency expertise is not talismanic, see *Radio Corp.* v. *United States*, 341 U. S. 412, 421 (1951) (Frankfurter, J., *dubitante*), and while the decision of the Board must be supported by substantial evidence, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), one cannot ask the agency to do the impossible. When choosing between alternative contentions

of coercion, the agency must make judgments based on available knowledge. This is a difficult task and accounts in part for the decision of Congress to entrust the Board "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *Tower Co.*, 329 U. S., at 330. Recognition of this discretion has been a recurrent theme in this Court's review of Board decisions. *NLRB* v. *Waterman S. S. Co.*, 309 U. S. 206, 226 (1940); *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969). In other contexts, the Board has had to perform the "far more delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner . . . ." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 229 (1963); *American Ship Bldg. Co.* v. *NLRB*, 380 U. S. 300, 312 (1965). There is certainly a conflicting interest between the union's right to make itself attractive to employees without misrepresentation and the employee's unfettered choice to vote for or against the union. I think it is rational for the Board to conclude on the basis of the facts presented that the decision of the Union to waive small fees was not coercive within the meaning of § 7. I, therefore, respectfully dissent.

ZAHN ET AL. *v.* INTERNATIONAL PAPER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72–888. Argued October 16, 1973—Decided December 17, 1973

Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount for suits in federal courts, and in this diversity class action under Fed. Rule Civ. Proc. 23 (b) (3) by owners of lakeshore property charging respondent with polluting the lake, where only the named plaintiffs but not the unnamed plaintiffs could show damages in the jurisdictional amount, a class action is not maintainable. Each plaintiff in a Rule 23 (b) (3) class action must satisfy the jurisdictional amount and any plaintiff who does not must be dismissed from the case. *Snyder* v. *Harris*, 394 U. S. 332, followed. Pp. 292–302.

469 F. 2d 1033, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 302.

Peter F. Langrock argued the cause and filed a brief for petitioners.

Taggart Whipple argued the cause for respondent. With him on the brief were *Richard E. Nolan, William H. Levit, Jr., Nicholas R. Weiskopf*, and *George W. Ray, Jr.**

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioners, asserting that they were owners of property fronting on Lake Champlain in Orwell, Vermont,

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**Norman Redlich* and *Stanley Buchsbaum* filed a brief for the city of New York as *amicus curiae* urging affirmance.

brought this action in the District Court on behalf of a class consisting of themselves and 200 lakefront property owners and lessees. They sought damages from International Paper Co., a New York corporation, for allegedly having permitted discharges from its pulp and paper-making plant, located in New York, to flow into Ticonderoga Creek and to be carried by that stream into Lake Champlain, thereby polluting the waters of the lake and damaging the value and utility of the surrounding properties. The suit was brought as a diversity action, jurisdiction assertedly resting on 28 U. S. C. § 1332 (a)(1). The claim of each of the named plaintiffs was found to satisfy the $10,000 jurisdictional amount, but the District Court was convinced "to a legal certainty" that not every individual owner in the class had suffered pollution damages in excess of $10,000. Reading *Snyder* v. *Harris*, 394 U. S. 332 (1969), as precluding maintenance of the action by any member of the class whose separate and distinct claim did not individually satisfy the jurisdictional amount and concluding that it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim, the District Court then refused to permit the suit to proceed as a class action. 53 F. R. D. 430 (Vt. 1971). A divided Court of Appeals affirmed, 469 F. 2d 1033 (CA2 1972), principally on the authority of *Snyder* v. *Harris, supra*. We granted the petition for writ of certiorari, 410 U. S. 925 (1973).

The Court of Appeals correctly held that this case is governed by the rationale of this Court's prior cases construing the statutes defining the jurisdiction of the District Court. We therefore affirm its judgment.

From the outset, Congress has provided that suits between citizens of different States are maintainable in the district courts only if the "matter in controversy"

exceeds the statutory minimum, now set at $10,000. 28 U. S. C. § 1332 (a).[1] The same jurisdictional-amount requirement has applied when the general federal-question jurisdiction of the district courts, 28 U. S. C. § 1331 (a), is sought to be invoked.[2] A classic statement of the dichotomy that developed in construing and applying

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[1] The section provides in pertinent part that:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States . . . ."

Section 11 of the First Judiciary Act of 1789 set the jurisdictional amount in diversity suits at $500. 1 Stat. 78. In 1801, Congress lowered the requirement to $400 in the Midnight Judges Act, 2 Stat. 89, 92, but it was quickly restored to $500 the following year. 2 Stat. 132. The jurisdictional-amount requirement remained fixed at this level until the Act of Mar. 3, 1887, 24 Stat. 552, when it was raised to $2,000. The figure was subsequently increased by $1,000 by the Act of Mar. 3, 1911, § 24, 36 Stat. 1091. See S. Rep. No. 388, 61st Cong., 2d Sess., pt. 2, pp. 30–32 (1910); H. R. Rep. No. 818, 61st Cong., 2d Sess. (1910); Conference Report, S. Doc. No. 848, 61st Cong., 3d Sess. (1911); 45 Cong. Rec. 3596–3599 (1910); 46 Cong. Rec. 4002, 4003, 4004 (1911).

The current $10,000 jurisdictional amount, codified in 28 U. S. C. § 1332 (a), was enacted by the Act of July 25, 1958, 72 Stat. 415. The legislative history discloses that the change was made "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong., 2d Sess., 3–4 (1958); see also *id.*, at 21; H. R. Rep. No. 1706, 85th Cong., 2d Sess., 3 (1958).

[2] Section 1331 (a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

these sections is found in *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 40–41 (1911):

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

This distinction and rule that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts were firmly rooted in prior cases dating from 1832,[3] and have continued to be the accepted construction

[3] The following are representative of innumerable cases confirming this principle: *Woodside* v. *Beckham*, 216 U. S. 117 (1910); *Waite* v. *Santa Cruz*, 184 U. S. 302, 328–329 (1902); *Wheless* v. *St. Louis*, 180 U. S. 379, 382 (1901); *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355 (1883). Cf. *Clay* v. *Field*, 138 U. S. 464 (1891); *Russell* v. *Stansell*, 105 U. S. 303 (1882); *Seaver* v. *Bigelows*, 5 Wall. 208 (1867); *Stratton* v. *Jarvis*, 8 Pet. 4 (1834); *Oliver* v. *Alexander*, 6 Pet. 143 (1832).

Snyder v. *Harris*, 394 U. S. 332 (1969), noted that the judicial interpretation of "matter in controversy" to bar aggregation of separate and distinct claims dated back to at least *Oliver* v. *Alexander*, which is representative of the unbroken line of decisions of this Court interpreting our appellate jurisdiction when that jurisdiction was confined to review of lower court decisions in which the "matter in dispute" exceeded a designated monetary amount. Consistently, plaintiffs with separate and distinct claims could not aggregate their respective "matters in dispute" to bring an appeal to this Court. See, *e. g.*, *Stewart* v. *Dunham*, 115 U. S. 61, 64–65 (1885) (and cases cited therein). The original *Alexander* construction of our appellate jurisdiction was applied to the jurisdictional-amount requirement for federal trial courts in *Walter* v. *Northeastern R. Co.*, 147 U. S. 370, 373 (1893):

"Is the plaintiff entitled to join [all his actions] in a single suit

of the controlling statutes, now §§ 1331 and 1332.[4] The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount, as was the case in *Scott* v. *Frazier*, 253 U. S. 243, 244 (1920), for example, where the Court stated the rule to be that "the amount in controversy must equal the jurisdictional sum as to each complainant." It also requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939); *Stewart* v. *Dunham*, 115 U. S. 61, 64–65 (1885); *Bernards Township* v. *Stebbins*, 109 U. S. 341, 355 (1883).

In *Clark* v. *Paul Gray, Inc.*, decided after the effective date of the Federal Rules of Civil Procedure in 1938, the Court applied the familiar rule that "when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount . . . , and . . . those amounts cannot be added together to satisfy jurisdictional requirements." 306 U. S., at 589. Upon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the

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in a Federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2,000? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff."

[4] *Rogers* v. *Hennepin County*, 329 U. S. 621 (1916); *Title Guaranty Co.* v. *Allen*, 240 U. S. 136 (1916); *Pinel* v. *Pinel*, 240 U. S. 594, 596 (1916); *Scott* v. *Frazier*, 253 U. S. 243, 244 (1920); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939).

jurisdictional amount, the Court reached the merits of that claim but directed the District Court to dismiss the claims of all other plaintiffs for want of jurisdiction.

The same rules were applied to class actions contemplated by Fed. Rule Civ. Proc. 23. The spurious class action authorized by Rule 23 (a)(3), as it stood prior to amendment in 1966,[5] was viewed by Judge Frank, writing for himself and Judges Learned and Augustus Hand, as, "in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." *Steele* v. *Guaranty Trust Co. of N. Y.*, 164 F. 2d 387, 388 (CA2 1947).[6] The direct precedent

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[5] Rule 23 (a)(3) provided:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

. . . . . .

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

[6] "The spurious class suit was a permissive joinder device. . . .

"There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance." 3B J. Moore, Federal Practice ¶ 23 10 [1], pp. 2601–2603 (2d ed. 1969).

Professor Moore thus recognized that the jurisdictional-amount requirements governing the joinder of separate and distinct claims applied to spurious class suits:

"These principles applied with equal force in the class action, since the class actions as constituted under original Rule 23 were but

for *Steele* was a 1941 decision in the same Circuit expressed in an opinion written by Judge Charles Clark, who, as a member of and Reporter for the Advisory Committee, was a principal architect of the Federal Rules of Civil Procedure. That case, *Hackner* v. *Guaranty Trust Co. of N. Y.*, 117 F. 2d 95 (CA2 1941), involved a class action brought on behalf of plaintiffs with separate and distinct claims. Judge Clark invoked a long line of authority in this Court, and in other courts, to hold that among parties related only by a common question of law and fact, "aggregation is improper" and that jurisdiction cannot be supplied for those without claims in the requisite amount "by adding a plaintiff who can show jurisdiction." *Id.*, at 98. (Citations omitted.) This was the accepted view in the federal courts with respect to class actions.[7] In consequence, district courts were to

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procedural devices to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants." *Id.*, ¶ 23.13, p. 2957.

[7] *Alfonso* v. *Hillsborough County Aviation Authority*, 308 F. 2d 724 (CA5 1962); *Troup* v. *McCart*, 238 F. 2d 289 (CA5 1956); *Hughes* v. *Encyclopaedia Britannica*, 199 F. 2d 295 (CA7 1952); *Ames* v. *Mengel Co.*, 190 F. 2d 344 (CA2 1951); *Miller* v. *National City Bank of New York*, 166 F. 2d 723 (CA2 1948); *Matlaw Corp.* v. *War Damage Corp.*, 164 F. 2d 281 (CA7 1947); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F. 2d 819 (CA6 1944); *Black & Yates, Inc.* v. *Mahogany Assn.*, 129 F. 2d 227 (CA3 1942); *Woerter* v. *Orr*, 127 F. 2d 969 (CA10 1942); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (CA2 1940); *Independence Shares Corp.* v. *Deckert*, 108 F. 2d 51, 53 (CA3 1939), rev'd on other grounds, 311 U. S. 282 (1940); *Ames* v. *Chestnut Knolls, Inc.*, 159 F. Supp. 791 (Del. 1958); *Air Line Dispatchers Assn.* v. *California Eastern Airways*, 127 F. Supp. 521 (ND Cal. 1954); *Goldberg* v. *Whittier Corp.*, 111 F. Supp. 382 (ED Mich. 1953); *Schuman* v. *Little Bay Constr. Corp.*, 110 F. Supp. 903 (SDNY 1953); *Giesecke* v. *Denver Tramway Corp.*, 81 F. Supp. 957 (Del. 1949); *Koster* v. *Turchi*, 79 F. Supp. 268 (ED Pa.) aff'd, 173 F. 2d 605 (CA3 1948); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F. Supp.

entertain the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional amount requirement.

The meaning of the "matter in controversy" language of § 1332 as it applied to class actions under Rule 23 reached this Court in *Snyder* v. *Harris, supra,* the occasion being a division of opinion in the courts of appeals as to whether the 1966 amendments to Rule 23 had changed the jurisdictional-amount requirement of § 1332 as applied to class actions involving separate and distinct claims.[8] None of the named plaintiffs and

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870, 873, 874–875 (WD Pa. 1947); *Long* v. *Dravo Corp.*, 6 F. R. D. 226 (WD Pa. 1946); *Scarborough* v. *Mountain States Tel. & Tel. Co.*, 45 F. Supp. 176 (WD Tex. 1942); *Stevenson* v. *City of Bluefield*, 39 F. Supp. 462 (SD W. Va. 1941).

[8] The Court of Appeals for the Fifth Circuit held that there had been no change in the rule. *Alvarez* v. *Pan American Life Insurance Co.*, 375 F. 2d 992, cert. denied, 389 U. S. 827 (1967). The same result was reached in the Eighth Circuit in *Snyder* v. *Harris*, 390 F. 2d 204, 205 (1968), but a contrary ruling developed in the Tenth Circuit, *Gas Service Co.* v. *Coburn*, 389 F. 2d 831, 833–834 (1968). We granted the petitions for certiorari in the latter two cases and decided them together. *Snyder* v. *Harris*, 394 U. S. 332 (1969).

In *Snyder*, the named plaintiff was a shareholder of an insurance company who brought a diversity suit against the company's board of directors on behalf of herself and approximately 4,000 other shareholders. Although Mrs. Snyder's claim totaled only $8,740 in damages, she defended the motion to dismiss for lack of jurisdiction on the ground that if all 4,000 potential claims were aggregated, the amount in controversy would well exceed $10,000. The District Court held that the claims could not be aggregated, and the Court of Appeals affirmed. In the consolidated case, *Gas Service Co.* v. *Coburn*, a customer of petitioner public utility brought a diversity suit on behalf of himself and 18,000 other similarly situated consumers, alleging the illegal collection of a city franchise tax. The single named plaintiff's damages amounted to only $7.81, but the District Court allowed all the claims to be aggregated to satisfy

none of the unnamed members of the class before the Court alleged claims in excess of the requisite amount. It was nevertheless urged that in class action situations, particularly in light of the 1966 amendments to the rule, aggregation of separate and distinct claims should be permitted. The Court was of a contrary view, holding that class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the $10,000 minimum specified in § 1332. Aggregation of claims was impermissible, and the federal court was without jurisdiction where none of the plaintiffs presented a claim of the requisite size. The Court unmistakably rejected the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional-amount requirement insofar as class actions are concerned.

> "The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.' The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. . . . Nothing in the amended Rule 23 changes this doctrine. . . . The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat

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the jurisdictional-amount requirement. The Court of Appeals affirmed.

them *differently* from joined actions for purposes of aggregation." 394 U. S., at 336–337.

The Court also refused to reconsider its prior constructions of the "matter in controversy" phrase, concluding that it should not do so where Congress, with complete understanding of how the courts had construed the statute, had not changed the governing language and down through the years had continued to specify and had progessively increased the jurisdictional amount necessary for instituting suit in the federal courts.

None of the plaintiffs in *Snyder* v. *Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.

This follows inescapably from the Court's heavy reliance on *Clark* v. *Paul Gray, Inc., supra,* where only one of several plaintiffs had a sufficiently large claim and all other plaintiffs were dismissed from the suit.[9] Moreover,

[9] The dissent recognizes that *Clark* requires the dismissal of any named plaintiff in an action whose case does not satisfy the jurisdictional amount. But apparently unnamed members of the class would enjoy advantages not shared by the named plaintiffs since their separate and distinct cases would be exempted from the jurisdictional-amount requirement. Why this should be the case and how this squares with *Clark* or with *Snyder* v. *Harris* are left unex-

the Court cited with approval the decision in *Alvarez* v. *Pan American Life Insurance Co.*, 375 F. 2d 992 (CA5), cert. denied, 389 U. S. 827 (1967), which was decided after the 1966 amendments to Rule 23 and which involved a class action with only one member of the class having a claim sufficient to satisfy § 1332. Only that claim was held within the jurisdiction of the District Court.

We conclude, as we must, that the Court of Appeals in the case before us accurately read and applied *Snyder* v. *Harris:* [10] Each plaintiff in a Rule 23 (b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—"one plaintiff may not ride in on another's coattails." 469 F. 2d, at 1035.

Neither are we inclined to overrule *Snyder* v. *Harris* nor to change the Court's longstanding construction of the "matter in controversy" requirement of § 1332. The Court declined a like invitation in *Snyder* v. *Harris* after surveying all relevant considerations and concluding that to do so would undermine the purpose and intent of Congress in providing that plaintiffs in diversity cases must present claims in excess of the specified jurisdictional amount. At this time, we have no good reason to disagree with *Snyder* v. *Harris* or with the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years.

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plained. We simply apply the rule governing named plaintiffs joining in an action to the unnamed members of a class, as *Snyder* v. *Harris* surely contemplated.

[10] The inevitability of this conclusion was suggested by the dissent in *Snyder* v. *Harris*, 394 U. S., at 343 (Fortas, J., dissenting). The same result was reached in *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948, 952–954 (1971), by the Court of Appeals for the Ninth Circuit.

It also seems to us that the application of the jurisdictional-amount requirement to class actions was so plainly etched in the federal courts prior to 1966 that had there been any thought of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries. But we find not a trace to this effect. As the Court thought in *Snyder* v. *Harris*, the matter must rest there, absent further congressional action.[11]

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that, in a diversity suit, a class action under Fed. Rule Civ. Proc. 23 (b)(3) is maintainable only when every member of the class, whether an appearing party or not, meets the $10,000 jurisdictional-amount requirement of 28 U. S. C. § 1332 (a). It finds this ruling compelled by the "rationale of this Court's prior cases construing the statutes defining the jurisdiction of the District Court." I disagree and respectfully dissent.

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[11] Because a class action invoking general federal-question jurisdiction under 28 U. S. C. § 1331 would be subject to the same jurisdictional-amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated, see *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 98–101 (1972), or if substantive federal law were held to control this case. Of course, Congress has exempted major areas of federal-question jurisdiction from any jurisdictional-amount requirements, see 28 U. S. C. §§ 1333–1334, 1336–1340, 1343–1345, 1347–1358, 1361–1362, the exemption being so widely applicable, in fact, that the Court in *Snyder* v. *Harris*, 394 U. S., at 341, discounted the impact of its holding in federal cases.

The jurisdictional-amount provision of § 1332 (a) tersely states that "the matter in controversy [must exceed] the sum or value of $10,000 . . . ." Those words, substantially unchanged since the passage of the Judiciary Act of 1789,[1] apply to "civil actions," and say nothing about the requirements applicable to individual claimants and individual claims. Although Congress has several times altered the amount required,[2] generally upward,[3] it has left the task of defining those requirements to the judiciary.[4] The result has been a relatively

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[1] Section 11, 1 Stat. 78. The First Judiciary Act used the term "matter in dispute," *ibid.*, and that phrase was retained until 1911, when the jurisdictional amount was increased from $2,000 to $3,000, Act of Mar. 3, 1911, § 24, 36 Stat. 1091, and the words "matter in controversy" were substituted.

[2] The amendments are catalogued in n. 1 of the Court's opinion.

[3] Adjustments for changes in the purchasing power of the dollar generally have been given as the explanation for this phenomenon. See, *e. g.*, S. Rep. No. 1830, 85th Cong., 2d Sess., 4 (1958):

"The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. . . . Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000."

See H. R. Rep. No. 1706, 85th Cong., 2d Sess., 3 (1958) (containing identical language). The only decrease, in 1801, is discussed in n. 1 of the Court's opinion.

[4] The only recent suggestion of congressional purpose is an oft-repeated statement in the legislative history of the 1958 amendments:

"The recommendations of the Judicial Conference [of the United States] regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available *in all substantial controversies* where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to

complex and sensitive set of rules designed to implement Congress' broad directive in a way that is responsive to the demands of fairness and efficiency in adjudication.

One "bright line" has emerged to control all § 1332 actions: there must be at least one plaintiff, or joint interest, seeking more than the statutory amount. *Snyder* v. *Harris*, 394 U. S. 332 (1969); *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39 (1911). The "long-standing" and "well established" rule on aggregation of claims that the Court invokes was developed to determine whether a group of claims was sufficiently interrelated to constitute such a "joint" claim or "common and undivided interest." [5]

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convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, *supra*, at 3–4 (emphasis added); H. R. Rep. No. 1706, *supra*, at 3 (containing identical language).

[5] See *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39 (1911), and cases cited in n. 3 of the Court's opinion. The Court also observes, quite correctly, that the same rule on aggregation has been applied to the federal-question jurisdiction, 28 U. S. C. § 1331. But the assertion, in the Court's final footnote, that the same jurisdictional rules it announces for § 1332 will apply to § 1331, is even more questionable than its application of those rules in this case. The continued need for exercise of diversity jurisdiction, at least where a showing of prejudice is not made, has been challenged by respected authorities. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 234–240 (1948); Currie, The Federal Courts and the American Law Institute (pts. I & II), 36 U. Chi. L. Rev. 1, 268 (1968, 1969). Cf. S. Rep. No. 1830, *supra*, n. 3. But a sharply different view has been taken of the federal-question jurisdiction, and the Court has reflected that view in its decisions upholding the exercise of jurisdiction over pendent claims under state law. See *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Similarly significant disincentives to assertion of federal rights in federal forums are likely if claimants are barred from combining to reduce the time and cost of litigation.

Once jurisdiction has attached to the "action," however, the "aggregation" rule has been but one of several ways to establish jurisdiction over additional claims and parties. In this case, the claims of the named plaintiffs provided the District Court with jurisdiction over the diversity action. And petitioners make no argument inconsistent with the Court's holding that the theory of "joint" claims or interests will not support jurisdiction over the nonappearing members of their class. Their contention is rather that a second theory, ancillary jurisdiction, supports a determination that those claims may be entertained.

Ancillary jurisdiction to adjudicate claims that cannot be fitted within the aggregation rules has long been recognized by this Court, see *Freeman* v. *Howe*, 24 How. 450 (1861); *Phelps* v. *Oaks*, 117 U. S. 236 (1886); *Wichita R. & Light Co.* v. *Public Utilities Comm'n*, 260 U. S. 48 (1922). But, as one commentator has pointed out, the rules developed to control the exercise of that jurisdiction cannot be explained by "any single rationalizing principle." C. Wright, Federal Courts § 9, p. 21 (2d ed. 1970). They are instead accommodations that take into account the impact of the adjudication on parties and third persons, the susceptibility of the dispute or disputes in the case to resolution in a single adjudication, and the structure of the litigation as governed by the Federal Rules of Civil Procedure.[6]

[6] See Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F. R. D. 27 (1963); H. Hart & H. Wechsler, The Federal Courts and the Federal System 1075–1081 (2d ed. 1973). Professor Kaplan, the Reporter for the 1966 amendments, has articulated his expectation that Rule 23 would be similarly accommodated:

"New rule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created. Like other innovations from time to time introduced into the Civil Rules,

After consideration of these factors, the Court has sustained the exercise of ancillary jurisdiction over compulsory counterclaims under Rule 13 (a), *Horton* v. *Liberty Mutual Insurance Co.*, 367 U. S. 348 (1961), aff'g 275 F. 2d 148 (CA5 1960); *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926). It has also done so where a party's intervention was held to be a matter of right, as is now provided by Rule 24 (a), *Phelps* v. *Oaks*, *supra;* see 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 593 (C. Wright ed. 1961). Following this lead, the courts of appeals have sustained ancillary jurisdiction over cross-claims permitted by Rule 13 (g), *R. M. Smythe & Co.* v. *Chase National Bank*, 291 F. 2d 721 (CA2 1961); *Childress* v. *Cook*, 245 F. 2d 798 (CA5 1957); over impleaded defendants under Rule 14, *Pennsylvania R. Co.* v. *Erie Avenue Warehouse Co.*, 302 F. 2d 843 (CA3 1962); and over defendants interpleaded under Rule 22, *Walmac Co.* v. *Isaacs*, 220 F. 2d 108 (CA1 1955). See Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874 *passim* (1958).[7]

Class actions under Rule 23 (b)(3) are equally appropriate for such treatment. There are ample assurances,

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those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 399–400 (1967).

[7] See also 7 C. Wright & A. Miller, Federal Practice & Procedure § 1756, pp. 564–565 (1972), approving as sound and "a natural corollary to other applications of the ancillary jurisdiction concept," a holding that only one representative party need meet the jurisdictional-amount requirement to support a class action in *Lesch* v. *Chicago & Eastern Illinois R. Co.*, 279 F. Supp. 908 (ND Ill. 1968).

in the provisions of the Rule that "the questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members," [8] to guarantee that ancillary jurisdiction will not become a facade hiding attempts to secure federal adjudication of nondiverse parties' disputes over unrelated claims. And the practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over compulsory counterclaims and parties that are entitled to intervene as of right. Class actions were born of necessity.[9] The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable. And this case presents precisely those difficulties: approximately 240 claimants are involved, and the issues will doubtless call for extensive use of expert testimony on difficult scientific issues.

It is, of course, true that an exercise of ancillary jurisdiction in such cases would result in some increase in the federal courts' workload, for unless the class action is permitted many of the claimants will be unable to obtain any federal determination of their rights. But that objection is applicable to every other exercise of ancil-

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[8] Rule 23 (b)(3). This Rule further states:

"The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[9] See 3B J. Moore, Federal Practice ¶¶ 23.02 [1], 23.05 *passim* (2d ed. 1969).

lary jurisdiction. It should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims.

If the State provides a class action device comparable to Rule 23 (b)(3), some of this inefficiency and unfairness may be avoided, but certainly not all. The named plaintiffs, and any other members of their class who can meet the jurisdictional-amount requirement, may choose to litigate those claims in the district courts, as these plaintiffs have shown to be their preference. Moreover, they will probably now be required separately to litigate the common issues in their cases,[10] thus possibly enlarging the federal judiciary's burden, and ironically reversing the Court's apparent purpose.

Moreover, if the State does not provide a Rule 23 (b)(3) device, litigation of the claims of class members who either lack the jurisdictional amount or simply prefer to litigate their claims in the state courts—as they would be free to do under any construction of the jurisdictional requirement—will produce a multitude of suits. And the chief influence mitigating that flood—the fact that many of these landowners' claims are likely to be worthless because the cost of asserting them on a case-by-case basis will exceed their potential value—will do no judicial system credit.

Not only does the practical desirability of sustaining ancillary jurisdiction bring Rule 23 (b)(3) class actions within the logic of our decisions, but the Court has long

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[10] This is the probable consequence of the District Court's determination, after holding that each class member had to meet the jurisdictional-amount requirement, that it could find "no appropriate class over which [it had] jurisdiction." 53 F. R. D. 430, 433 (Vt. 1971); see *infra*, at 311–312.

since recognized that fact, and has sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity laid down in *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806). In *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U. S. 356 (1921), the Court not only held that only the original named plaintiffs and defendants had to satisfy the diversity requirements, but it also stated that intervention by nondiverse members of the class would not destroy the District Court's jurisdiction. *Id.,* at 366. Particularly in view of the constitutional background on which the statutory diversity requirements are written, see 469 F. 2d 1033, 1038 (CA2 1972) (Timbers, J., dissenting), it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory "matter in controversy" requirement is concerned.

Certainly this result is not compelled by *Snyder* v. *Harris,* 394 U. S. 332 (1969), for that decision turned solely on whether federal diversity jurisdiction could be established over the "action." Nor can I accept the Court's contention that *Snyder*'s citation to *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583 (1939), controls here. That case dealt only with the jurisdictional-amount requirements for the original named plaintiffs who litigated the case. Here petitioners clearly meet that requirement. *Snyder*'s characterization of *Clark* as a class action did not turn that case into a precedent for applying the jurisdictional-amount requirements to nonappearing class members who, so far as the Court indicated in *Clark,* were not even involved in that case.

It would be far more consistent with *Clark* for the Court to rule, as it did in *Supreme Tribe of Ben-Hur,* that only the original named plaintiffs must meet the jurisdictional requirements, and that nonappearing class mem-

bers and intervenors need not. Such a ruling, while going a step farther than petitioners seek, would be reasonable and pragmatically justified. There is a substantial difference between the impact on a case of an appearing party and a nonappearing class member, and intervention poses no threat since the district courts are given discretion by Rule 23 (d)(3) to permit intervention subject to appropriate conditions. See 3B J. Moore, Federal Practice ¶ 23.73 (3), p. 1441 (2d ed. 1969). The question in this case is not whether the class action must be permitted, but whether the District Court has the power to determine whether to permit it, taking into account the elaborate guidance and discretion provided by Rule 23.

The Court also appears to rely on *Snyder*'s rejection of "the notion that the 1966 amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional amount requirement insofar as class actions are concerned." *Ante*, at 299. *Snyder* based this rejection on Rule 82's admonition that the Federal Rules of Civil Procedure are not to be "construed to extend or limit the jurisdiction of the United States district courts . . . ." Reliance on Rule 82 was proper there because the petitioner contended that the restructuring of Rule 23 to abolish "spurious" class actions in favor of a "functional" approach that took into account the nature of the litigation and its effects undercut this Court's long line of decisions establishing the minimum requirements for diversity jurisdiction over a "civil action."

But this case presents no suggestion that the 1966 amendments override the Court's decisions construing § 1332. There are no earlier decisions construing the jurisdictional-amount requirements for the nonappearing members of a "spurious" class, probably because the old Rule did not bind members of the class unless they

affirmatively requested inclusion.[11] Nor did the 1966 amendments bring Rule 23 (b)(3) class actions within any other holdings. If anything, they merely made the determination whether the class should be permitted to turn more directly on the kinds of concerns that have motivated the exercise of ancillary jurisdiction.[12]

The question in this case ought, instead, to be whether changes in the Civil Rules may affect, and be affected by, the determination whether to exercise existing jurisdiction. Of course, they must. As the Reporter to the Advisory Committee on Civil Rules that prepared the 1966 amendments has observed: "From the start the Civil Rules, elaborating and complicating actions through joinder of claims and parties, have profoundly influenced jurisdictional result." [13] The Court's prior decisions upholding novel exercises of ancillary jurisdiction have made liberal use of the opportunities presented by the Civil Rules and amendments of them, and Rule 82 has stood as no bar to that action.

Indeed, the effects of today's decision will also be influenced by the form of Rule 23. The District Court, after ruling that ancillary jurisdiction could not be exercised, was confronted with a dilemma that did not exist prior to the 1966 amendments: identification of the members of the class that would be bound by the decision so that they could be provided the required notice.[14] After

[11] See Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 941–942 and cases cited n. 493 (1958).

[12] See Rules 23 (a)(1), (2), (3) and (b)(3)(A), (B), (C). Cf. H. Hart & H. Wechsler, *supra*, n. 6, at 1078. ("Under the revised rule, which contemplates that in a class action all members of the class not properly excluded will be bound by the judgment, the 'spurious' class action no longer exists, and ancillary jurisdiction may support intervention by class members in all cases.")

[13] Kaplan, *supra*, n. 6, at 400.

[14] Rules 23 (c)(2), (3).

determining that it was not possible to determine which of the 240 proposed members met the $10,000 requirement, the court denied class action status to all. But few, if any, Rule 23 (b)(3) classes will lend themselves to a determination, on the basis of the pleadings, that each proposed member meets that requirement. Intervention, at least for the purpose of establishing jurisdiction, may be necessary, and that is more than even the old Rule contemplated when it specified that class members had to request inclusion in order to be bound.

Thus, on the basis of the Court's implicit holding that ancillary jurisdiction would not support recognition of a Rule 23 (b)(3) class, the 1966 amendments will still influence the number of cases in which federal jurisdiction will be exercised. They will, as in this case, simply curtail the exercise of jurisdiction rather than expand it. In view of the Court's previous concern with practical realities in both its cases involving class actions and its cases involving the exercise of ancillary jurisdiction, I think that this limitation is both unwarranted and unwise.

Syllabus

BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL.

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 72–397. Argued October 15, 1973—Decided December 17, 1973

Certain land abutting the east bank of the Colorado River was conveyed in 1910 by federal patent to a railroad company. Upon admission to the Union in 1912 Arizona succeeded the Federal Government to title to the bed of the Colorado River. The river's gradual eastward movement submerged the subject land by erosion so that title was mechanically transferred to the State as part of the riverbed. In 1955 petitioner cattle company acquired title to the original railroad grant, most of which by that time was covered by water. In 1959 the subject land was abandoned by the Colorado as a result of a federal rechanneling project. Petitioner cattle company filed this action to quiet title and prevailed in the lower courts, but the Arizona Supreme Court reversed, holding that under the equal-footing doctrine and the Submerged Lands Act, Arizona held title to the beds of all navigable waters within its borders and thus to the subject land as a result of the river's gradual eastward movement. *Held:*

1. Ownership of the subject land is governed by federal law. The issue here is not what rights the State has accorded private owners in lands that the State holds as sovereign but how far the State's sovereign right extends under the equal-footing doctrine and the federal Submerged Lands Act, *i. e.*, whether the State retains title to lands formerly beneath the Colorado or whether title thereto is defeasible by withdrawal of those waters. Pp. 317–321.

2. The equal-footing doctrine does not support the State's claim, since when the water receded from the disputed land, there was no longer a public purpose to be served by the State, as sovereign, holding title thereto. Pp. 321–324.

3. Nor does the Submerged Lands Act, which did not abrogate the federal law of accretion, support the State's claim, since that Act does not extend to the States any interest in the beds of navigable rivers beyond those afforded by the equal-footing doctrine. Pp. 324–325.

4. Title to the subject land, under the applicable federal common law, is vested in petitioner as riparian landowner and not in the State as owner of the riverbed. Pp. 325–332.

(a) Analysis of the interests of the State and petitioner, in

light of the rationales for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the State, as owner of the riverbed, and petitioner, as riparian owner, the surfacing of the subject land should be treated as an accretion; hence title to the disputed land should be vested in petitioner. Pp. 325–330.

(b) The doctrine of avulsion (whereby an avulsive change caused by a stream suddenly and perceptively abandoning its old channel does not affect title and the boundary established by the former river stream remains at that line, even if the result is to cut off a landowner's riparian rights) does not apply here because of the limited interests of the State in the subject property. Pp. 328–329.

107 Ariz. 465, 489 P. 2d 699, and 108 Ariz. 258, 495 P. 2d 1312, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 332. REHNQUIST, J., took no part in the consideration or decision of the case.

Elmer C. Coker argued the cause for petitioners. With him on the briefs was *Leonard C. Langford.*

Dale R. Shumway argued the cause for respondents. With him on the brief was *Gary K. Nelson,* Attorney General of Arizona.*

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE BRENNAN.

The question for decision is whether title to land abandoned by the stream of the Colorado River as a

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork* for the United States, and by *Evelle J. Younger,* Attorney General, *Jay L. Shavelson,* Assistant Attorney General, and *Warren J. Abbott* and *Jerold A. Krieger,* Deputy Attorneys General, for the State of California.

Briefs of *amici curiae* were filed by *Philip E. von Ammon* for the Santa Fe Pacific Railroad Co., and by *David H. Getches* for the Cocopah Tribe of Indians.

result of a federal rechanneling project vests in the State of Arizona, as owner of the beds under navigable streams within its borders, or in petitioner cattle company, as the owner of land riparian to the river at the time of the rechanneling.

The circumstances that give rise to this case are as follows. In 1910, the subject land was conveyed by federal patent, as part of a larger parcel, to the Santa Fe Pacific Railroad Co. A survey conducted in 1905 and 1906, and approved by the Surveyor General of the United States in 1906, indicates that as of the date of the patent, the Santa Fe parcel abutted the east bank of the Colorado River.[1] Upon admission to the Union in 1912, Arizona succeeded the Federal Government to title to the bed of the Colorado River. The exact location of the river in 1912 in relation to the subject property is unclear from the record, but it is generally agreed that between 1903 and 1959 (when it was rechanneled) the river moved gradually eastward, eroding its east bank and depositing alluvion on its west bank, resulting in the submergence by erosion of the subject land. As the river crept eastward, the boundary between

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[1] The federal patent to the Santa Fe Pacific Railroad conveyed a parcel of land in township 19 North of Range 22 West, described as follows:

"The lots one, two, three, four, five and six, the south half of the northeast quarter, the south half of the northwest quarter, the northeast quarter of the southwest quarter, and the southeast quarter of section three, containing five hundred eighty-nine and forty hundredths acres."

The map of the area, approved by the Surveyor General, indicates that, as of 1906, lots 5 and 6 of the Santa Fe parcel abutted the Colorado River. Petitioner Bonelli Cattle Co. was deeded a parcel of land constituting roughly the eastern half of the original Santa Fe grant. The Bonelli deed described the subject property as the "E[ast] ½ [of] Section 3, excepting Lot 2 thereof."

upland owners and the state-owned riverbed moved mechanically with it, transferring title to the lands which became part of the riverbed to the State. The operation of Hoover Dam, begun in 1938, reduced the flow of water in the Colorado River and substantially decreased its annual flood stage high-water mark. Nonetheless, by 1955, when the Bonelli Cattle Co. acquired title to the subject portion of the original Santa Fe grant, all but 60 acres in the southeast corner of its parcel was covered by water. In 1959, a Federal Bureau of Reclamation Project deepened and rechanneled the Colorado River in the area of the subject land, thereby confining the stream of the river to a substantially reduced portion of the Bonelli property.[2]

In 1962, the Bonelli Cattle Co. filed the instant action to quiet title to the land from which the river had withdrawn as a result of the federal rechanneling project. The state trial court granted judgment for Bonelli and against the State of Arizona. The Arizona Court of Appeals, the State's intermediate appellate court, affirmed, upholding Bonelli's contention that if the changes in the river were accretive, the surfaced land belonged to Bonelli, as a riparian owner, and if the change were avulsive, the land nonetheless belonged to Bonelli under the doctrine of re-emergence.[3]

The Arizona Supreme Court reversed,[4] holding that under the equal-footing doctrine and the Submerged Lands Act, Arizona holds title to the beds of all navigable

[2] The rechannelization also surfaced a small usable pocket of land on the west bank of the Colorado River which was part of the Bonelli parcel. This land is not in Arizona by virtue of the Boundary Compact between Arizona and Nevada, approved by Congress, Pub. L. 87–50, 75 Stat. 93, and hence is not involved in the present controversy.

[3] 11 Ariz. App. 412, 464 P. 2d 999 (1970).

[4] 107 Ariz. 465, 489 P. 2d 699 (1971).

waters within its borders and thus to the subject land as a result of the gradual eastward movement of the river. The Arizona Supreme Court found that, because the federal rechannelization project was an "engineering relocation of the waters of the river by artificial means," it was, under state law, an avulsive change, which did not divest the State of its title to the exposed land which had formerly been part of the riverbed. The court denied a rehearing and, in a supplemental opinion, clarified the extent of the dry land owned by the State.[5] It held that the high-water mark of the river, to which the State's ownership extends, was fixed by the natural state of the river as it existed in 1938, before the operation of Hoover Dam.[6] We granted certiorari, 410 U. S. 908 (1973). We hold that the ownership of the subject land is governed by federal law, and that the land surfaced by the narrowing of the river channel belongs, not to the State as owner of the riverbed, but to Bonelli as riparian owner. We need not, therefore, reach the question of whether the Arizona Supreme Court properly determined the average high-water mark of the river.

I

The first issue we must decide is whether state or federal law governs this controversy. The State of Arizona claims title to the subject land by virtue of the equal-footing doctrine[7] and the Submerged Lands Act,[8] the basic principles of which are as follows. When the

[5] 108 Ariz. 258, 495 P. 2d 1312 (1972).

[6] Before the operation of Hoover Dam, the river's annual spring floods covered substantially more of the adjacent land than at any time thereafter. It is to the high-water mark of the river at this annual flood stage that the State of Arizona claims title.

[7] See Joint Res. No. 8, To Admit the Territories of New Mexico and Arizona as States into the Union on an equal footing with the original States, 37 Stat. 39.

[8] 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*

Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. As new States were forged out of the federal territories after the formation of the Union, they were "admitted [with] the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford* v. *Wardwell*, 6 Wall. 423, 436 (1867). Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the equal-footing doctrine. See, *e. g.*, *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845); *Shively* v. *Bowlby*, 152 U. S. 1 (1894); *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57, 65–66 (1873).

In order for the States to guarantee full public enjoyment of their navigable watercourses,[9] it has been held that their title to the bed of a navigable river mechanically follows the river's gradual changes in course. See *Oklahoma* v. *Texas*, 268 U. S. 252 (1925). Thus, where portions of a riparian owner's land are encroached upon by a navigable stream, under federal law, the State succeeds to title in the bed of the river to its new high-water mark.

The Submerged Lands Act of 1953 did not disturb these doctrines or their inherent limitations. The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal claims thereto. And, consonant with the above-described common-law doctrine concerning title to the bed of a river that has shifted course, the Submerged Lands Act quitclaims all federal rights to title to lands beneath the navigable streams, as "hereafter modified by accretion, erosion, and reliction." 43 U. S. C. § 1301 (a)(1).

[9] See discussion, *infra*, at 321–324.

The State of Arizona asserts title to the subject land on the basis of the following application of these principles. When Arizona achieved statehood in 1912, it assumed title to the land beneath the stream of the Colorado River, by virtue of the equal-footing doctrine.[10] It subsequently acquired title to the subject land when it was submerged by the river's eastward movement. The State asserts that once having acquired title, it was not divested of its proprietary interest in the land by the subsequent withdrawal of the water due to the rechanneling of the river.

Having concluded that title to the subject land was thus vested in the State as a matter of settled federal law, the state courts determined that local law controlled whether petitioner, as a riparian owner, had any interest in the land thereafter. As the Court said in *Arkansas* v. *Tennessee,* 246 U. S. 158, 176 (1918): "[I]t is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . ."

We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title

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[10] The Colorado River has been determined to be a navigable waterway, *Arizona* v. *California,* 283 U. S. 423 (1931), and, once found to be navigable, it remains so. *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 408 (1940).

to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters. As this Court observed in *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22 (1935): "The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, . . . is necessarily a federal question. . . . [I]t involves the ascertainment of the essential basis of a right asserted under federal law."

Arkansas v. *Tennessee, supra,* and the cases cited therein are not to the contrary. In *Arkansas* v. *Tennessee,* for example, we held that federal law governed the question of how far into the river channel a State held title. Only then did this Court turn to state law to determine whether riparian owners had been accorded any rights in that land. But even the State's disposition of its submerged land vis-à-vis private owners was to be "in each case limited by the interstate boundary," a matter determined by federal law. 246 U. S., at 176. Similarly, in *Shively* v. *Bowlby,* 152 U. S. 1 (1894), the Court held that under settled federal law, the tidelands there at issue belonged to the State in its sovereign capacity; hence whether the State had accorded riparian owners any interests in the tidelands properly remained a matter of local law; "if [the States] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." *Id.,* at 43. In *Barney* v. *Keokuk,* 94 U. S. 324, 338 (1877), the Court left it to the States to decide whether to accord title to the land beneath nontidal navigable waters to riparian owners after recognizing that under federal law such lands belong to the States. See also *Scott* v. *Lattig,* 227 U. S. 229, 242 (1913).

The present case, however, does not involve a question of the disposition of lands, the title to which is vested in the State as a matter of settled federal law. The very question to be decided is the nature and extent of

the title to the bed of a navigable stream held by the State under the equal-footing doctrine and the Submerged Lands Act. In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a "right asserted under federal law." [11]

II

We cannot accept the State's argument that the equal-footing doctrine supports its claim to the disputed land. Historically, title to the beds beneath navigable waters is held by the sovereign, *Barney* v. *Keokuk, supra,* at 338, as a public trust for the protection of navigation and related purposes.

> "[T]itle to the . . . lands under water . . . enures to the State within which they are situated . . . . Such title . . . [is] held in trust for the public purposes of

[11] Petitioner Bonelli and the Solicitor General of the United States, as *amicus curiae,* assert that this case should be governed by federal law for a different reason. In *Hughes* v. *Washington,* 389 U. S. 290 (1967), this Court held that where an upland property owner traced its title to a pre-statehood federal patent, the owner's right to accretions is a question of federal law. *Id.,* at 292. We are here again concerned with the right to accretions conveyed by a pre-statehood federal patent, but it is unclear whether, at the time of Santa Fe Pacific's patent, the portion of the land which ultimately became Bonelli's parcel was actually riparian. Bonelli argues that its remote grantor, the Santa Fe Pacific Railroad, was given a patent by the United States which afforded it the right to riparian accretions as governed by federal law, and that it was expected that the river might wander within the parcel of land making parts thereof riparian which were not so at the time of the patent. Petitioner argues that its predecessor was therefore entitled to pass onto his successors all the rights he had in the property—including his riparian rights. We need not, however, decide whether *Hughes* compels the application of federal law to the controversy before us, because the State's claim in this case is premised on a construction of the federal equal-footing doctrine and the congressionally enacted Submerged Lands Act.

> navigation and fishery." *Hardin* v. *Jordan*, 140 U. S. 371, 381 (1891).

See *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 808 (1950). As this Court observed in an earlier federal water law case:

> "Such waters . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing . . . ." *Shively* v. *Bowlby*, *supra*, at 11.

The State's title is to the "[river]bed as a bed," [12] and the State of Arizona will continue to hold title to the bed beneath the Colorado River to its present high-water mark. But the exposed land involved here is no longer, as described in *Shively*, "incapable of ordinary and private occupation . . . [whose] primary uses are public in their nature, for highways of navigation . . . ." [13] The equal-footing doctrine was never intended to provide a State with a windfall of thousands of acres of dry land exposed when the main thread of a navigable stream is changed.[14] It would be at odds with the fundamental

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[12] *State* v. *Gill*, 259 Ala. 177, 183, 66 So. 2d 141, 145 (1953). For a perceptive discussion of the historical antecedents for the sovereign's rights in the beds of navigable waterways and of the State's modern interests in those lands, see Lundquist, Artificial Additions to Riparian Land: Extending the Doctrine of Accretion, 14 Ariz. L. Rev. 315 (1972).

[13] 152 U. S., at 11.

[14] The Supreme Court of Arizona relied on this Court's decisions in *Goodtitle* v. *Kibbe*, 9 How. 471 (1850), and *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), for the proposition that a federal rechanneling project could not diminish the extent of the State's landholdings. Those decisions involved post-statehood federal patents of land covered by navigable waters at the time of statehood. This Court held only that since title to lands beneath navigable waters was vested in

purpose of the original grant to the States to afford a State title to land from which a navigable stream had receded unless the land was exposed as part of a navigational or related public project of which it was a necessary and integral part or unless, of course, the artificial accretion was somehow caused by the upland owner himself. There has been no showing that the rechannelization project was undertaken to give the State title to the subject lands for the protection of navigation or related public goals.[15] Indeed, the State of Arizona did not participate in the rechannelization of the Colorado River, although it had implicitly assented to the project.[16]

The advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently,

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Alabama at statehood, the Federal Government did not thereafter own the subject lands, hence its attempted conveyance was void. The Court did not intimate that the operation of federal law could not diminish the State's title to lands formerly beneath navigable waters.

[15] For a discussion of the navigational-purpose limitation on the State's interest in the lands beneath its waterways, see *United States* v. *River Rouge Co.*, 269 U. S. 411, 419 (1926); *Colberg, Inc.* v. *State*, 67 Cal. 2d 408, 416, 432 P. 2d 3, 8–9 (1967), cert. denied, 390 U. S. 949 (1968); *Michaelson* v. *Silver Beach Assn.*, 342 Mass. 251, 173 N. E. 2d 273 (1961). The extent of the State's interests should not be narrowly construed because it is denominated a navigational purpose. See *Zabel* v. *Tabb*, 430 F. 2d 199 (CA5 1970), cert. denied, 401 U. S. 910 (1971) (recognizing conservation as a proper interest). Since the State asserts no public need for ownership of the subject land we do not attempt to define the exact parameters of the permissible public purposes.

[16] In contrast, this Court's decision in *Marine R. & Coal Co.* v. *United States*, 257 U. S. 47 (1921), involved a determination of federal rights in land created when the Federal Government itself filled in tidelands belonging to it under a series of interstate compacts.

the State, as sovereign, has no need for title. That the cause of the recession was artificial, or that the rate was perceptible, should be of no effect.

Nor does the Submerged Lands Act provide a basis for the State's claim to the subject lands. The Arizona Supreme Court incorrectly construed this Act as a grant by Congress to the States of lands "*formerly* . . . beneath navigable waters." [17] The Act did not abrogate the federal law of accretion, but defined lands beneath navigable waters as being those covered by streams as "hereafter modified by accretion, erosion, and reliction." [18] Contrary to the implication raised by the Arizona Supreme Court, the Act creates no new rights for the States in the beds of their inland waterways. The Act is not a grant of title to land but only a quitclaim of federal proprietary rights in the beds of navigable waterways.[19] The Act specifically excepts from its scope lands lawfully conveyed or patented by the United States.[20] Since the Act does not extend to the States any interest beyond those afforded by the equal-

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[17] 108 Ariz., at 259, 495 P. 2d, at 1313 (emphasis added).

[18] 43 U. S. C. § 1301 (a)(1).

[19] The legislative history of the Act indicates that it was intended to be merely confirmatory of the State's existing rights in the beds of their navigable waterways. S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, pp. 6–8 (1953); *People* v. *Hecker*, 179 Cal. App. 2d 823, 4 Cal. Rptr. 334 (1960). See generally 1953 U. S. Code Cong. & Ad. News 1395–1640. Congress was concerned about this Court's decision in *United States* v. *California*, 332 U. S. 19 (1947), which held that the Federal Government had a "paramount interest" in the marginal sea-lands "outside of inland waters, but within territorial limits"—and that the States had no title in those lands. See H. R. Rep. No. 1778, 80th Cong., 2d Sess., 5 (1948). That concern is irrelevant to the case before us, which involves an inland waterway.

[20] 43 U. S. C. § 1301 (f).

footing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine.

III

The question remains as to who owns the subject land under the applicable federal common law. It is, of course, clear that the State of Arizona did hold title to the subject property before the waters of the river receded. Both the State and the Solicitor General of the United States as *amicus curiae,* urge that the federal common-law doctrine of avulsion is applicable and thus that the State remains holder of title in the former riverbed. Bonelli, the only private claimant, argues that the narrowing of the river course should properly be characterized as an artificial accretion, hence that the disputed land, which had originally been lost from the Bonelli parcel to the river by erosion, should once again belong to it as the riparian owner.

Federal law recognizes the doctrine of accretion whereby the "grantee of land bounded by a body of navigable water acquires a right to any . . . gradual accretion formed along the shore." *Hughes* v. *Washington,* 389 U. S. 290, 293 (1967); accord, *Jones* v. *Johnston,* 18 How. 150, 156 (1856). When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land:

> "It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is

diminished he has no recourse for the loss." *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 624 (1912).

There are a number of interrelated reasons for the application of the doctrine of accretion. First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded.[21] Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes* v. *Washington, supra,* at 293; *Yates* v. *Milwaukee,* 10 Wall. 497, 504 (1871). Riparianness also encompasses the vested right to future alluvion, which is an "essential attribute of the original property." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. *Ibid.* The effect of the doctrine of accretion is to give the riparian owner a " ' "fee, determinable upon the occupancy of his soil by the river," and [to afford] the State [a title] to the river bed [which is] likewise a . . . "qualified" fee, "determinable in favor of the riparians upon the abandonment of the bed by the river." ' " [22]

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[21] *E. g., Nebraska* v. *Iowa,* 143 U. S. 359, 365–366 (1892); *Hardin* v. *Jordan,* 140 U. S. 371 (1891); *Anderson-Tully Co.* v. *Tingle,* 166 F. 2d 224, 227–228 (CA5), cert. denied, 335 U. S. 816 (1948).

[22] 107 Ariz., at 472, 489 P. 2d, at 706 (Lockwood, J., dissenting), quoting, *State* v. *R. E. Janes Gravel Co.,* 175 S. W. 2d 739, 741 (Tex.

The doctrine of accretion applies to changes in the river course due to artificial as well as natural causes. *County of St. Clair* v. *Lovingston, supra,* at 64–69; *United States* v. *Claridge,* 416 F. 2d 933 (CA9 1969), cert. denied, 397 U. S. 961 (1970) (changes in the Colorado River's course, caused by the construction of Hoover Dam, are accretive). Where accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof.[23]

But the federal law is otherwise where "a stream suddenly and perceptibly abandons its old channel." *Philadelphia Co.* v. *Stimson,* 223 U. S., at 624–625. Such an avulsive change does not affect title and the boundary established by the former river stream remains at that line, even if the result is to cut off a landowner's riparian rights. *St. Louis* v. *Rutz,* 138 U. S. 226, 245 (1891). The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied. As this Court, quoting from 8 Op. Atty. Gen. 175, observed in *Nebraska* v. *Iowa,* 143 U. S. 359, 362 (1892):

> "'[When in] deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed.'"

Civ. App. 1943), rev'd on other grounds *sub nom. Maufrais* v. *State,* 142 Tex. 559, 180 S. W. 2d 144 (1944).

[23] See sources collected at *Burns* v. *Forbes,* 412 F. 2d 995, 997 n. 2 (CA3 1969); cf. *Beaver* v. *United States,* 350 F. 2d 4, 11 (CA9 1965), cert. denied, 383 U. S. 937 (1966); *Esso Standard Oil Co.* v. *Jones,* 233 La. 915, 98 So. 2d 236, aff'd on rehearing, 233 La. 940, 98 So. 2d 244 (1957).

The Arizona Supreme Court held that because the rechanneling of the Colorado River was an "engineering relocation of the waters of the river by artificial means," it was, under state law, an avulsion and did not divest the State of title to the land from which the river had withdrawn. But federal law must be applied with a view toward the limited nature of the sovereign's rights in the riverbed, and an analysis of the interests of the State and Bonelli, in light of the rationales for the federal common-law doctrines of accretion and avulsion, compels the conclusion that, as between the State, as owner of the riverbed, and Bonelli, as a riparian owner, the surfacing of the subject land should be treated as accretion; hence title to the disputed land should be vested in Bonelli.

The rationale for the application of the doctrine of avulsion is not applicable to this dispute because of the limited interests of the State in the subject property. The Federal Government, which holds a paramount navigable servitude in the river,[24] determined that it was too wide and shallow to permit navigation in the area of the subject land, and that the river therefore needed to be deepened and rechanneled. The resulting changes in the river's thread actually enhanced the State's interest in the navigability of the river. The State's acquisition of the exposed land here could only be a windfall, since unnecessary to the State's purpose in holding title to the beds of the navigable streams within its borders.[25] Accordingly, the narrowing of the river and vesting of title to the surfaced land in riparian owners does not detract from the State's legitimate interest in title to

[24] See, *e. g.*, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 633–635 (1912).

[25] See discussion, *supra*, at 321–324.

the riverbed,[26] so as to require mitigation of the accretion principle by application of the doctrine of avulsion.

The policies behind the doctrine of accretion are, however, fully applicable. That doctrine guarantees the riparian character of land by automatically granting to a riparian owner title to lands which form between his holdings and the river and thus threaten to destroy that valuable feature of his property. The riparian owner is at the mercy, not only of the natural forces which create such intervening lands, but also, because of the navigational servitude, of governmental forces which may similarly affect the riparian quality of his estate. Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State. See *Michaelson* v. *Silver Beach Assn.*, 342 Mass. 251, 173 N. E. 2d 273 (1961).

Similarly, riparian lands may suffer noncompensable losses or be deprived of their riparian character altogether by the State or Federal Government in the exercise of the navigational servitude. In compensation for such losses, land surfaced in the course of such governmental activity should inure to the riparian owner where not necessary to the navigational project or its purpose. In

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[26] The State may well have an interest in the river as an interstate boundary justifying application of avulsion principles to determining the location of that boundary; "[t]he emergence of . . . land . . . ought not in reason to have any controlling effect upon the location of the boundary line . . . ." *Arkansas* v. *Tennessee*, 246 U. S. 158, 175 (1918). But, since the land claimed by the State and petitioner is already limited by the interstate boundary, however determined, there is no such interest to compel application of avulsion principles to the disposition of title to the subject property.

the case before us, all of the subject land, which composed a substantial portion of Bonelli's parcel, was lost to the State by erosion to serve the public interest in the navigability of the river. Now that the land has resurfaced in the process of rechannelization, it should return to the estate of the riparian owner.[27]

> "No other rule can be applied on just principles. Every proprietor whose land is thus bounded [by a navigable stream], is subject to loss, by the same means which may add to his territory: and as he is without remedy for his loss, in this way, he cannot

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[27] Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges as a result of perceptible change in the river course, title to the surfaced land revests in its former owner. See *Arkansas* v. *Tennessee,* 246 U. S., at 174–175; *Beaver* v. *United States,* 350 F. 2d, at 11. The re-emergence doctrine has been accepted by a number of States, *Herron* v. *Choctaw & Chickasaw Nations,* 228 F. 2d 830 (CA10 1956) (applying Oklahoma law); *State* v. *Gill,* 259 Ala. 177, 66 So. 2d 141 (1953); *Esso Standard Oil Co.* v. *Jones,* 233 La. 915, 98 So. 2d 236, aff'd on rehearing, 233 La. 940, 98 So. 2d 244 (1957); *Mulry* v. *Norton,* 100 N. Y. 424, 3 N. E. 581 (1885). Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land identifiable as part of his original parcel. In that sense, we have embraced the re-emergence concept.

But we need not here determine whether, in a suit between private landowners (or in which the State claims title in some capacity other than as owner of the riverbed), the differing interests of the parties might require a holding that the rechannelization should be treated as an avulsion. Nor need we determine whether, in a suit between a riparian owner and a former owner of surfaced land, the former should take the property as an accretion or the latter as a re-emergence. It is only the State's claim to title under the equal-footing doctrine which required the invocation of federal law to resolve the instant dispute.

be held accountable for his gain." *New Orleans* v. *United States,* 10 Pet. 662, 717 (1836).

Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. As MR. JUSTICE STEWART warned in *Hughes* v. *Washington,* 389 U. S., at 298 (concurring opinion):

> "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. . . . [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ."

In the exercise of its navigational servitude, the State or Federal Government may decrease the value of riparian property without compensation because the property is held subject to the exercise of that servitude. The government may, without paying compensation, deprive a riparian owner of his common-law right to use flowing water, *St. Anthonys Falls Water Power Co.* v. *St. Paul Water Comm'rs,* 168 U. S. 349 (1897), or to build a wharf over the water, *Shively* v. *Bowlby,* 152 U. S. 1 (1894). We have held that the State may deprive the owner of the riparian character of his property in the exercise of its navigational servitude. *United States* v. *Rands,* 389 U. S. 121 (1967). But there is no claim here by the State that depriving Bonelli of the subject land is necessary to any navigational or related purpose. Cf. *United States* v. *River Rouge Co.,* 269 U. S. 411,

419 (1926); *Colberg, Inc.* v. *State*, 67 Cal. 2d 408, 432 P. 2d 3 (1967), cert. denied, 390 U. S. 949 (1968). Moreover, what is involved in this case is not just the diminution or elimination of riparian rights, but the State's attempt to completely divest all of Bonelli's title and interest in the subject land. See *Yates* v. *Milwaukee*, 10 Wall., at 504.

IV

We hold that title to the subject land, which was exposed by the federal rechannelization of the Colorado River, is vested in petitioner Bonelli Cattle Co. The judgment of the Supreme Court of Arizona is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, dissenting.

The Court in this case holds that federal common law governs the resolution of conflicting claims to the exposed bed of a navigable river between Arizona as the owner of the riverbed and a riparian landowner.[1] I

[1] The Court emphasizes the fact that it is the State that holds the title to the riverbed property. The nature of the title held by the State, however, is such that it could be conveyed to a private owner. ("[T]he settled law of this country [is] that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable [rivers], within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof . . . ." *Shively* v. *Bowlby*, 152 U. S. 1, 47 (1894); *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892); *United States* v. *Holt Bank*, 270 U. S. 49, 54–55 (1926).) Since the State could hardly convey more title than it held, it would appear from the Court's opinion

think this ruling emasculates the equal-footing doctrine, under which this Court has long held "that the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." *Mumford* v. *Wardwell,* 6 Wall. 423, 436 (1867).

After the Revolution, the 13 Original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property. *Ibid.* "[T]he shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States." *Ibid.* If the equal-footing doctrine means what it says, then the States that were later admitted to the Union must hold the same title and must exercise the same sovereignty. *Weber* v. *Board of Harbor Comm'rs,* 18 Wall. 57, 65–66 (1873); *Shively* v. *Bowlby,* 152 U. S. 1, 16 (1894); *Pollard's Lessee* v. *Hagan,* 3 How. 212, 223 (1845). Just as with other real property within a State's boundaries, an element of sovereignty over the property constituting the riverbed is the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property. Today, however, the Court holds that federal common law supersedes the common-law property rules applied by Arizona pursuant to its sovereign authority over the property in question.

This Court has repeatedly recognized a State's power, as a function of its sovereignty over the lands within its borders, to apply state common-law property rules

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that federal law would also govern the resolution of conflicting claims to the exposed riverbed as between a private owner of the bed and a private riparian owner.

such as those applied by the Supreme Court of Arizona in this case:

> "Th[e] right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes . . . ; and also . . . to navigable rivers . . . ; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." *Hardin* v. *Jordan*, 140 U. S. 371, 382 (1891).

With respect to an avulsion exposing large portions of riverbed and leading to conflicting claims to the ownership of the exposed land, virtually the twin of this case, the Court has said:

> "How the land that emerges . . . shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . Thus, [the State] may limit riparian ownership by the ordinary high-water mark . . . [or] may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion . . . ." *Arkansas* v. *Tennessee*, 246 U. S. 158, 175–176 (1918).

Along the same vein, the Court has said:

> "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. . . . The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country . . . . [I]t laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied . . . is for the several States themselves to determine. . . . [The decision] properly belongs to the States by their inherent sovereignty . . . ." *Barney* v. *Keokuk*, 94 U. S. 324, 337–338 (1877).

To put the matter bluntly, the Court's application of the equal-footing doctrine in this case seems to me wholly wrong. While conceding that the later admitted States have " 'the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders,' " *ante*, at 318, the Court holds that "the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine" involves a " 'right asserted under federal law' " that must be determined under the rules of federal common law. The effect of the Court's analysis is completely to undercut the equal-footing doctrine. As noted above, the original States derived their sovereign rights

and powers directly from the Crown after the Revolution and retained whatever powers they did not later surrender or limit in the Federal Constitution. Even under the Court's "title" analysis, therefore, federal common law would not govern the conflicting claims involved here if the river were located in Massachusetts or Virginia, rather than in Arizona.

The upshot of the Court's decision is that the 13 Original States are free to develop and apply their own rules of property law for the resolution of conflicting claims to an exposed bed of a river, while those States admitted after the Constitution's ratification must under today's decision knuckle under to this Court's supervisory view of "federal common law." A later-admitted State like Arizona is thus not at all on an equal footing with the original States in the exercise of sovereignty over real property within its boundaries. And the vehicle used by the Court to arrive at this unjust result is, incredibly, the very doctrine that was intended to insure to the new States equal footing with the original States. Thus, the Court's strange application of the equal-footing doctrine brings that constitutional principle into fundamental conflict with the purpose it was intended to serve.

If the equal-footing doctrine means anything, it means that Arizona cannot be treated as a second-class State. It means that, upon admission to the Union, it received title to, and sovereignty over, the beds of navigable rivers within its boundaries, to the same extent as the original States after the Revolution. As a function of that sovereignty, Arizona courts have the power to develop and apply state common law in determining legal questions that arise with respect to this property, including conflicting claims to the bed that is later exposed by the vagaries of the river. And

the power of the Arizona courts to decide this controversy under state law surely includes the power to decide it in a way that we here might think is wholly wrong.[2]

[2] The Court implies, but does not hold, that the decision of the Arizona Supreme Court might constitute a taking of the petitioner cattle company's property without compensation, in violation of due process of law. My conviction that this infirmity was present in the decision of the Washington Supreme Court was the reason for my special concurrence in *Hughes* v. *Washington*, 389 U. S. 290, 294–298 (1967). *Hughes* was a case in which a state court effected a retroactive change in state property law that resulted in an unconstitutional taking of property without compensation. That, however, is not the situation here. The Arizona Supreme Court simply applied its established property rules with regard to the effects of avulsion, accretion, erosion, and reliction in resolving conflicting claims to the exposed riverbed. It declined the petitioners' invitation to adopt the "enlightened" re-emergence doctrine as part of the law of Arizona. This case, therefore, does not involve a retroactive alteration of state law such as would constitute an unconstitutional taking of private property.

UNITED STATES *v.* CALANDRA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-734. Argued October 11, 1973—Decided January 8, 1974

When respondent's place of business was being searched by federal agents under a warrant issued in connection with a gambling investigation and specifying that the object of the search was to discover and seize bookmaking records and wagering paraphernalia, one agent, knowing of a pending federal investigation of loansharking activities, discovered and seized a suspected loansharking record. Subsequently, a grand jury investigating loansharking activities subpoenaed respondent to query him on the seized evidence, but he refused to testify on Fifth Amendment grounds. After the Government then requested transactional immunity for respondent, the District Court granted respondent's suppression motion on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant, and further ordered that respondent need not answer any of the grand jury's questions based on the suppressed evidence. The Court of Appeals affirmed. *Held:* A witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Pp. 342-355.

(a) The exclusionary rule, under which evidence obtained in violation of the Fourth Amendment or the fruits of such evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure, is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved. Pp. 347-348.

(b) Despite its broad deterrent purpose, the rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served. P. 348.

(c) Allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious dis-

charge of the grand jury's duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role. Pp. 349–352.

(d) Grand jury questions based on evidence obtained from an unlawful search and seizure involve no independent governmental invasion of privacy, but rather the usual abridgment thereof common to all grand jury questioning. Such questions are only a derivative use of the product of a past unlawful search and seizure and work no new Fourth Amendment wrong. Pp. 353–355.

465 F. 2d 1218, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 356.

Louis F. Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Bork*, former *Solicitor General Griswold, Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, Keith A. Jones, Jerome M. Feit*, and *Shirley Baccus-Lobel.*

Robert J. Rotatori argued the cause for respondent. With him on the brief were *Gerald S. Gold* and *Niki Z. Schwartz.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. The issue is of considerable importance to the administration of criminal justice.

**Melvin L. Wulf* and *Paul Halvonik* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

I

On December 11, 1970, federal agents obtained a warrant authorizing a search of respondent John Calandra's place of business, the Royal Machine & Tool Co. in Cleveland, Ohio. The warrant was issued in connection with an extensive investigation of suspected illegal gambling operations. It specified that the object of the search was the discovery and seizure of bookmaking records and wagering paraphernalia. A master affidavit submitted in support of the application for the warrant contained information derived from statements by confidential informants to the Federal Bureau of Investigation (FBI), from physical surveillance conducted by FBI agents, and from court-authorized electronic surveillance.[1]

The Royal Machine & Tool Co. occupies a two-story building. The first floor consists of about 13,000 square feet, and houses industrial machinery and inventory. The second floor contains a general office area of about 1,500 square feet and a small office occupied by Calandra, president of the company, and his secretary. On December 15, 1970, federal agents executed the warrant directed at Calandra's place of business and conducted a thorough, four-hour search of the premises. The record reveals that the agents spent more than three hours searching Calandra's office and files.

Although the agents found no gambling paraphernalia, one discovered, among certain promissory notes, a card indicating that Dr. Walter Loveland had been making periodic payments to Calandra. The agent stated in an affidavit that he was aware that the United States Attor-

[1] On the basis of the same affidavit, federal agents also obtained warrants authorizing searches of Calandra's residence and automobile. The present case involves only the search of the Royal Machine & Tool Co.

ney's office for the Northern District of Ohio was investigating possible violations of 18 U. S. C. §§ 892, 893, and 894, dealing with extortionate credit transactions, and that Dr. Loveland had been the victim of a "loansharking" enterprise then under investigation. The agent concluded that the card bearing Dr. Loveland's name was a loansharking record and therefore had it seized along with various other items, including books and records of the company, stock certificates, and address books.

On March 1, 1971, a special grand jury was convened in the Northern District of Ohio to investigate possible loansharking activities in violation of federal laws. The grand jury subpoenaed Calandra in order to ask him questions based on the evidence seized during the search of his place of business on December 15, 1970. Calandra appeared before the grand jury on August 17, 1971, but refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The Government then requested the District Court to grant Calandra transactional immunity pursuant to 18 U. S. C. § 2514. Calandra requested and received a postponement of the hearing on the Government's application for the immunity order so that he could prepare a motion to suppress the evidence seized in the search.

Calandra later moved pursuant to Fed. Rule Crim. Proc. 41 (e) for suppression and return of the seized evidence on the grounds that the affidavit supporting the warrant was insufficient and that the search exceeded the scope of the warrant. On August 27, the District Court held a hearing at which Calandra stipulated that he would refuse to answer questions based on the seized materials. On October 1, the District Court entered its judgment ordering the evidence suppressed and returned to Calandra and further ordering that Calandra need not answer any of the grand jury's questions based on the

suppressed evidence. 332 F. Supp. 737 (1971). The court held that "due process . . . allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure." *Id.*, at 742. The court found that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant.

The Court of Appeals for the Sixth Circuit affirmed, holding that the District Court had properly entertained the suppression motion and that the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawful search and seizure.[2] 465 F. 2d 1218 (1972). The offer to grant Calandra immunity was deemed irrelevant. *Id.*, at 1221.

We granted the Government's petition for certiorari, 410 U. S. 925 (1973). We now reverse.

II

The institution of the grand jury is deeply rooted in Anglo-American history.[3] In England, the grand jury

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[2] The Court of Appeals affirmed the District Court's finding that the search of Calandra's business and seizure of his property were unlawful. 465 F. 2d 1218, 1226 n. 5. Although the Government does not agree with the court's finding, it has not sought review of this issue. In addition, the Government has not challenged the District Court's order directing return of the illegally seized property to Calandra.

[3] For a discussion of the history and role of the grand jury, see *Costello* v. *United States*, 350 U. S. 359, 361–362 (1956); *Blair* v. *United States*, 250 U. S. 273, 279–283 (1919); *Hale* v. *Henkel*, 201 U. S. 43, 59 (1906); 4 W. Blackstone, Commentaries *301 *et seq.*; G. Edwards, The Grand Jury 1–44 (1906); 1 F. Pollock & F. Maitland, History of English Law 151 (2d ed. 1909); 1 W. Holdsworth, History of English Law 321–323 (7th rev. ed. 1956).

served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello* v. *United States,* 350 U. S. 359, 361–362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg* v. *Hayes,* 408 U. S. 665, 686–687 (1972).

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States,* 250 U. S. 273, 282 (1919).

The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine

whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged. *Branzburg* v. *Hayes, supra,* at 700; *Costello* v. *United States, supra,* at 364.

In *Branzburg,* the Court had occasion to reaffirm the importance of the grand jury's role:

> "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . ." 408 U. S., at 700.
>
> "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. . . . 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' *Wood* v. *Georgia,* 370 U. S. 375, 392 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' *United States* v. *Stone,* 429 F. 2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States,* 350 U. S., at 362. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . . ." *Id.,* at 701–702.

The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected

by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, *Costello* v. *United States, supra; Holt* v. *United States,* 218 U. S. 245 (1910); or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, *Lawn* v. *United States,* 355 U. S. 339 (1958).

The power of a federal court to compel persons to appear and testify before a grand jury is also firmly established. *Kastigar* v. *United States,* 406 U. S. 441 (1972). The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932); *United States* v. *Bryan,* 339 U. S. 323, 331 (1950). In *Branzburg* v. *Hayes, supra,* at 682 and 688, the Court noted that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . ." and that "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings." The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure. *Blair* v. *United States,* 250 U. S., at 281. Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." *Id.,* at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Ibid.*

Of course, the grand jury's subpoena power is not unlimited.[4] It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. *Branzburg* v. *Hayes, supra; United States* v. *Bryan, supra; Blackmer* v. *United States, supra;* 8 J. Wigmore, Evidence §§ 2290–2391 (McNaughton rev. ed. 1961). Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid, *Lawn* v. *United States, supra,* the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. Rather, the grand jury may override a Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. *Kastigar* v. *United States, supra.* Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. *Boyd* v. *United States,* 116 U. S. 616, 633–635 (1886). Cf. *Couch* v. *United States,* 409 U. S. 322 (1973). The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is "far too sweeping in its terms to be regarded as reasonable" under the Fourth Amendment. *Hale* v. *Henkel,* 201 U. S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.

[4] The grand jury is subject to the court's supervision in several respects. See *Brown* v. *United States,* 359 U. S. 41, 49 (1959); Fed. Rules Crim. Proc. 6 and 17; 1 L. Orfield, Criminal Procedure Under the Federal Rules § 6:108, pp. 475–477 (1966). In particular, the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a subpoena on motion if compliance would be "unreasonable or oppressive." Fed. Rule Crim. Proc. 17 (c).

III

In the instant case, the Court of Appeals held that the exclusionary rule of the Fourth Amendment limits the grand jury's power to compel a witness to answer questions based on evidence obtained from a prior unlawful search and seizure. The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks* v. *United States,* 232 U. S. 383 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. *Wong Sun* v. *United States,* 371 U. S. 471 (1963); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920).

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker,* 381 U. S. 618, 637 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U. S. 206, 217 (1960).

Accord, *Mapp* v. *Ohio*, *supra*, at 656; *Tehan* v. *Shott*, 382 U. S. 406, 416 (1966); *Terry* v. *Ohio*, 392 U. S. 1, 29 (1968). In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[5]

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. *Brown* v. *United States*, 411 U. S. 223 (1973); *Alderman* v. *United States*, 394 U. S. 165 (1969); *Wong Sun* v. *United States*, *supra*; *Jones* v. *United States*, 362 U. S. 257 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.[6]

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[5] There is some disagreement as to the practical efficacy of the exclusionary rule, and as the Court noted in *Elkins* v. *United States*, 364 U. S. 206, 218 (1960), relevant "[e]mpirical statistics are not available." Cf. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials.

[6] In holding that the respondent had standing to invoke the exclusionary rule in a grand jury proceeding, the Court of Appeals relied on Fed. Rule Crim. Proc. 41 (e). 465 F. 2d, at 1222–1224. Rule

IV

In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. It is evident that this extention of the exclusionary rule would seriously impede the grand jury. Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective.[7] The probable

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41 (e) provides, in relevant part, that "[a] person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for the use as evidence anything so obtained . . . ." It further states that "[t]he motion shall be made before trial or hearing . . . ." We have recognized that Rule 41 (e) is "no broader than the constitutional rule." *Alderman* v. *United States,* 394 U. S. 165, 173 n. 6 (1969); *Jones* v. *United States,* 362 U. S. 257 (1960). Rule 41 (e), therefore, does not constitute a statutory expansion of the exclusionary rule.

The Court of Appeals also found that the Government's offer of immunity under 18 U. S. C. § 2514 was irrelevant to respondent's standing to invoke the exclusionary rule. 465 F. 2d, at 1221. We agree with that determination for the reasons stated in Parts III, IV, and V of this opinion.

[7] The force of this argument is well illustrated by the facts of the present case. As of the date of this decision, almost two and one-half years will have elapsed since respondent was summoned

result would be "protracted interruption of grand jury proceedings," *Gelbard* v. *United States*, 408 U. S. 41, 70 (1972) (WHITE, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

> "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U. S. 1, 17 (1973).

Cf. *United States* v. *Ryan*, 402 U. S. 530 (1971); *Cobbledick* v. *United States*, 309 U. S. 323 (1940). In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties.

Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule. Suppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment. But it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct. In *Alderman* v. *United States*, 394 U. S., at 174–175, for example, this

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to appear and testify before the grand jury. If respondent's testimony was vital to the grand jury's investigation in August 1971 of extortionate credit transactions, it is possible that this particular investigation has been completely frustrated.

Court declined to extend the exclusionary rule to one who was not the victim of the unlawful search:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

We think this observation equally applicable in the present context.

Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly

minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[8]

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[8] Respondent relies primarily on *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920), which the dissent contends "plainly controls this case." *Post*, at 362. In that case, federal officers unlawfully seized certain documents belonging to the Silverthornes and their lumber company and presented them to a grand jury that had already indicted the Silverthornes and the company. A district court ordered the return of the documents but impounded photographs and copies of the originals. Later, the prosecutor caused the grand jury to issue subpoenas *duces tecum* to the Silverthornes and the company to produce the originals, and their refusal to comply led to a contempt citation. In reversing the judgment, the Court held that the subpoenas were invalid because they were based on knowledge obtained from the illegally seized evidence, citing *Weeks* v. *United States*, 232 U. S. 383 (1914). Mr. Justice Holmes, writing for the Court, stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S., at 392.

Silverthorne is distinguishable from the present case in several significant respects. There, plaintiffs in error had previously been indicted by the grand jury and thus could invoke the exclusionary rule on the basis of their status as criminal defendants. Moreover, the Government's interest in recapturing the original documents was founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury. It did not appear that the grand jury needed the documents to perform its investigative or accusatorial functions. Thus, the primary consequence of the Court's decision was to exclude the evidence from the subsequent criminal trial. Finally, prior to the issuance of the grand jury subpoenas, there had been a judicial determination that the search and seizure were illegal. The claim of plaintiffs in error was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings.

By contrast, in the instant case respondent had not been indicted by the grand jury and was not a criminal defendant. Under traditional principles, he had no standing to invoke the exclusionary rule. The effect of the District Court's order was to deprive the grand

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Respondent also argues that each and every question based on evidence obtained from an illegal search and seizure constitutes a fresh and independent violation of the witness' constitutional rights.[9] Ordinarily, of course, a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony. He may invoke his Fifth Amendment privilege against compulsory self-incrimination, but he may not decline to answer on the grounds that his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs. *Blair* v. *United States,* 250 U. S. 273 (1919). Respondent's claim must be, therefore, not merely that the grand jury's questions invade his privacy but that, because those questions are based on illegally obtained evidence, they somehow

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jury of testimony it needed to conduct its investigation. Furthermore, respondent's motion to suppress had not been previously made and required interruption of the grand jury proceedings. In these circumstances, *Silverthorne* is certainly not controlling. To the extent that the Court's broad dictum might be construed to suggest a different result in the present case, we note that it has been substantially undermined by later cases. See Parts III and IV of this opinion.

[9] At oral argument, counsel for respondent stated the contention as follows:

"I submit to the Court that each question asked of the Respondent before the Grand Jury, which question was only asked because of a past violation of the Fourth Amendment, [amounts to] a new, immediate violation of the Fourth Amendment . . . . [A] question derived from a past violation, a question into the privacy of the witness amounts to another intrusion in violation of the Fourth Amendment." Tr. of Oral Arg. 17.

"[R]efusing to answer a question in which the question conceivably is derived from a past violation of the Fourth Amendment, gives rise to an additional or new Fourth Amendment right to resist answering that question because the question itself becomes an additional intrusion . . . ." Tr. of Oral Arg. 19–20.

constitute distinct violations of his Fourth Amendment rights. We disagree.

The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies.

In the usual context of a criminal trial, the defendant is entitled to the suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence. The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct. In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect. Our conclusion necessarily controls both the evidence seized during the course of an unlawful search and seizure and any question or evidence derived therefrom (the fruits of the unlawful search).[10] The same considerations of logic and policy apply to both the fruits

[10] It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to

of an unlawful search and seizure and derivative use of that evidence, and we do not distinguish between them.[11]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that the exclusionary rule in search-and-seizure cases does not apply to grand jury proceedings because the principal objective of the rule is "to deter future unlawful police conduct," *ante,* at 347, and "it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal."

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his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure.

[11] The dissent's reliance on *Gelbard* v. *United States,* 408 U. S. 41 (1972), is misplaced. There, the Court construed 18 U. S. C. § 2515, the evidentiary prohibition of Tit. III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U. S. C. §§ 2510–2520. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either *Gelbard* or the legislative history, that Tit. III was regarded as a restatement of existing law with respect to grand jury proceedings. As MR. JUSTICE WHITE noted in his concurring opinion in *Gelbard,* Tit. III "unquestionably

Ante, at 351. This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.

The commands of the Fourth Amendment are, of course, directed solely to public officials. Necessarily, therefore, only official violations of those commands could have created the evil that threatened to make the Amendment a dead letter. But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees. They thus bore out James Madison's prediction in his address to the First Congress on June 8, 1789:

> "If they [the rights] are incorporated into the Constitution, independent tribunals of justice will

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works a change in the law with respect to the rights of grand jury witnesses . . . ." 408 U. S., at 70.

The dissent also voices concern that today's decision will betray " 'the imperative of judicial integrity,' " sanction "illegal government conduct," and even "imperil the very foundation of our people's trust in their Government." *Post*, at 360. There is no basis for this alarm. "Illegal conduct" is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced. Cf. *Alderman* v. *United States*, 394 U. S. 165 (1969); *Linkletter* v. *Walker*, 381 U. S. 618 (1965); and cases cited *supra*, at 347–348.

> consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

Since, however, those judges were without power to direct or control the conduct of law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

That these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule clearly emerges from the decision which fashioned it:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . *should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all condi-*

tions have a right to appeal for the maintenance of such fundamental rights. . . .

. . . . . .

"This protection is equally extended to the action of the Government and officers of the law acting under it. . . . *To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.*" *Weeks* v. *United States,* 232 U. S. 383, 391–392, 394 (1914) (emphasis added).

Mr. Justice Brandeis and Mr. Justice Holmes added their enormous influence to these precepts in their notable dissents in *Olmstead* v. *United States,* 277 U. S. 438 (1928). Mr. Justice Brandeis said:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.,* at 485.

And Mr. Justice Holmes said:

"[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to

> choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
>
> ". . . If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." *Id.*, at 470.

The same principles were reiterated less than six years ago. In *Terry* v. *Ohio*, 392 U. S. 1, 12–13 (1968), Mr. Chief Justice Warren said for the Court:

> "The rule also serves another vital function—'the imperative of judicial integrity.' *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

It is true that deterrence was a prominent consideration in the determination whether *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which applied the exclusionary rule to the States, should be given retrospective effect. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). But that lends no support to today's holding that the application of the exclusionary rule depends solely upon whether its invocation in a particular type of proceeding will significantly further the goal of deterrence. The emphasis upon deterrence in *Linkletter* must be understood in the light of the crucial fact that the States had justifiably relied from 1949 to 1961 upon *Wolf* v. *Colorado*, 338 U. S. 25 (1949), and consequently, that application of *Mapp* would have required the wholesale release of innumerable convicted prisoners, few of whom could have been successfully retried. In that circumstance, *Linkletter* held not only that retrospective application of *Mapp* would not further the goal of deterrence but also

that it would not further "the administration of justice and the integrity of the judicial process." 381 U. S., at 637. Cf. *Kaufman* v. *United States,* 394 U. S. 217, 229 (1969).

Thus, the Court seriously errs in describing the exclusionary rule as merely "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *Ante,* at 348. Rather, the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy," *Mapp* v. *Ohio, supra,* at 651, and "an essential part of both the Fourth and Fourteenth Amendments," *id.,* at 657, that "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *Id.,* at 660.

This *Mapp* summation crystallizes the series of decisions that developed the rule and with which today's holding is plainly at war. For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct. This rejection of "the imperative of judicial integrity," *Elkins* v. *United States,* 364 U. S. 206, 222 (1960), openly invites "[t]he conviction that all government is staffed by . . . hypocrites[, a conviction] easy to instill and difficult to erase." Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255, 258 (1961). When judges appear to become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," *Elkins* v. *United States, supra,* at 223, we imperil the very foundation of our people's trust in their Government on which our democracy rests. See *On Lee* v. *United*

States, 343 U. S. 747, 758–759 (1952) (Frankfurter, J., dissenting). The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera. Moreover,

> "[I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States,* 357 U. S. 301, 313 (1958).

The judges who developed the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to behave in forbidden fashion. A similar judgment led the Court to decide in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), that a grand jury must be denied access to plainly relevant but illegally seized papers. In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and their corporation, and presented the documents to a grand jury which had previously indicted the Silverthornes, a district court ordered the documents returned and copies that had been prepared in the interim impounded. After returning the originals, the grand jury attempted to recoup them by issuance of a subpoena *duces tecum.* Compliance with the subpoena was refused, and contempt convictions followed. In reversing the judgment of convictions, the Court, speaking through Mr. Justice Holmes, held that the Government was barred from utilizing any fruits of its forbidden act,

stating that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.*, at 392.

Silverthorne plainly controls this case. Respondent, like plaintiffs in error in *Silverthorne*,[1] seeks to avoid furnishing the grand jury with evidence that he would not have been called upon to supply but for the unlawful search and seizure. The Court would distinguish *Silverthorne* on the ground that there the plaintiffs in error had been indicted and could invoke the exclusionary rule "on the basis of their status as criminal defendants," since the Government's effort to obtain the documents was "founded on a belief that they might be useful in the criminal prosecution already authorized by the grand jury." *Ante*, at 352 n. 8. The effort was clearly not founded on any such belief. Overlooked is the fact that the grand jury's interest in again obtaining the documents in *Silverthorne* may well have been to secure information leading to further criminal charges, especially since indictments of three other individuals, as well as additional indictments of the Silverthornes, had been the consequence of initial submission of the documents to the grand jury. See Brief on Behalf of Plaintiffs in Error in No. 358, O. T. 1919, pp. 4, 18–19.[2]

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[1] Neither the Silverthorne Lumber Co., because it was a corporation, see *Hale* v. *Henkel*, 201 U. S. 43 (1906), nor respondent, because he was granted transactional immunity, could invoke the privilege against self-incrimination. The situations are therefore completely comparable.

[2] The Court also argues that "[t]he [Silverthorne's claim] was not raised for the first time in a pre-indictment motion to suppress requiring interruption of grand jury proceedings," *ante*, at 352 n. 8, and therefore presumably its assertion occasioned no delay. However, the District Court in *Silverthorne* had granted an earlier application for return of the seized documents from the grand jury after

Only if *Silverthorne* is overruled can its precedential force to compel affirmance here be denied.

Congressional concern with the *Silverthorne* holding was clearly evidenced in enactment of 18 U. S. C. § 2515, providing that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication *and no evidence derived therefrom* may be received in evidence in any . . . proceeding in or before *any . . . grand jury* . . . if the disclosure of that information would be in violation of this chapter." (Emphasis added.) In *Gelbard* v. *United States,* 408 U. S. 41 (1972), we set aside the adjudication in criminal contempt of a grand jury witness who refused to comply with a court order to testify on the ground that interrogation was to be based upon information obtained from the witness' communications allegedly intercepted by federal agents by means of illegal wiretapping and electronic surveillance. Our reasons track the grounds advanced in *Silverthorne.*

> "The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both

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determining that they had been obtained in violation of the Fourth Amendment. This Court made no intimation that the District Court acted improperly in considering the initial application.

> to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." 408 U. S., at 51 (footnotes omitted).

Similarly to allow Calandra to be subjected to questions derived from the illegal search of his office and seizure of his files is "to thwart the [Fourth and Fourteenth Amendments' protection] of . . . individual privacy . . . and to entangle the courts in the illegal acts of Government agents." *Ibid.* "And for a court, on petition of the executive department, to sentence a witness, who is [himself] the victim of the illegal [search and seizure], to jail for refusal to participate in the exploitation of that [conduct in violation of the explicit command of the Fourth Amendment] is to stand our whole system of criminal justice on its head." *In re Evans,* 146 U. S. App. D. C. 310, 323, 452 F. 2d 1239, 1252 (1971) (Wright, J., concurring).

It is no answer, to suggest as the Court does, that the grand jury witnesses' Fourth Amendment rights will be sufficiently protected "by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." *Ante,* at 351. This, of course, is no alternative for Calandra, since he was granted transactional immunity and cannot be criminally prosecuted. But the fundamental flaw of the alternative is that to compel Calandra to testify in the first place under penalty of contempt necessarily "thwarts" his Fourth Amendment protection and "entangle[s] the courts in the illegal acts of Government agents"—consequences that *Silverthorne* condemned as intolerable.

To be sure, the exclusionary rule does not "provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman* v. *United States,* 394 U. S. 165, 175 (1969). But clearly there is a crucial

distinction between withholding its cover from individuals whose Fourth Amendment rights have not been violated—as has been done in the "standing" cases, *Alderman* v. *United States, supra; Jones* v. *United States,* 362 U. S. 257 (1960)—and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged.

Respondent does not seek vicariously to assert another's Fourth Amendment rights. He himself has been the victim of an illegal search and desires "to mend no one's privacy [but his] own." *Gelbard* v. *United States, supra,* at 63 (DOUGLAS, J., concurring). Respondent is told that he must look to damages to redress the concededly unconstitutional invasion of his privacy. In other words, officialdom may profit from its lawlessness if it is willing to pay a price.

In *Mapp,* the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. 367 U. S., at 654–655. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not "significantly" do so. Unless we are to shut our eyes to the evidence that crosses our desks every day, we must concede that official lawlessness has not abated and that no empirical data distinguishes trials from grand jury proceedings. I thus fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case

also, that "it is unrealistic to assume" that application of the rule at trial would "significantly further" the goal of deterrence—though, if the police are presently undeterred, it is difficult to see how removal of the sanction of exclusion will induce more lawful official conduct.

The exclusionary rule gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789). We betray the trust upon which that prediction rested by today's long step toward abandonment of the exclusionary rule. The observations of a recent commentator highlight the grievous error of the majority's retreat:

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, Studying the

Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970).

See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1562–1563 (1972).

I dissent and would affirm the judgment of the Court of Appeals.

GATEWAY COAL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72–782. Argued October 15, 1973—Decided January 8, 1974

Certain foremen at petitioner company's coal mine were suspended for falsifying records to show no reduction in airflow at the mine when in fact the airflow had been substantially reduced because of the collapse of a ventilation structure. When the company reinstated the foremen while criminal charges were pending against them, the miners, who are represented by respondent union, struck to protest the alleged safety hazard created by retention of the foremen. The union refused the company's offer to arbitrate. The company then brought this action under § 301 of the Labor Management Relations Act, contending that the broad arbitration clause of the collective-bargaining agreement governed the dispute. The District Court issued a preliminary injunction requiring the union to end the strike and submit to arbitration, and ordered suspension of the two foremen pending the arbitral decision. The Court of Appeals reversed and vacated the injunction, holding that there was a public policy disfavoring compulsory arbitration of safety disputes and that, absent an express provision of the collective-bargaining agreement, the union had no contractual duty to submit the controversy to arbitration and hence no implied obligation not to strike. *Held:*

1. The arbitration clause of the collective-bargaining agreement covering, *inter alia*, "any local trouble of any kind aris[ing] at the mine," is sufficiently broad to encompass the instant dispute, the foremen's continued presence in the mine being plainly a local issue. Pp. 374–380.

(a) On its face such contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire. P. 376.

(b) The "presumption of arbitrability" (an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and doubts should be resolved in favor of coverage), *Steelworkers* v. *American*

Mfg. Co., 363 U. S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, applies to safety disputes. Pp. 377–380.

2. The duty to arbitrate imposed by the collective-bargaining agreement gave rise to an implied no-strike obligation supporting issuance of an injunction against a work stoppage since, in the absence of an explicit expression negating any implied no-strike obligation, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application. Pp. 380–384.

3. On the facts, § 502 of the Labor Management Relations Act providing that the quitting of labor by employees in good faith because of abnormally dangerous conditions for work shall not be deemed a strike, did not deprive the District Court of authority to enforce the no-strike obligation, the suspension of the foremen pending a final arbitral decision having eliminated any safety issue. Pp. 385–387.

4. The circumstances of this case satisfy the traditional equitable considerations controlling the availability of injunctive relief, *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, the District Court finding that the union's continued breach of its no-strike obligation would irreparably harm the petitioner, and eliminating any safety issue by suspending the foremen pending a final arbitral decision. P. 387.

466 F. 2d 1157, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 388.

Leonard L. Scheinholtz argued the cause for petitioner. With him on the briefs were *Henry J. Wallace, Jr.*, and *Daniel R. Minnick*.

Joseph A. Yablonski argued the cause for respondents. With him on the brief were *Clarice R. Feldman* and *Daniel B. Edelman*.*

*Briefs of *amici curiae* urging reversal were filed by *Milton A. Smith* and *Lawrence M. Cohen* for the Chamber of Commerce of the United States; by *Guy Farmer* for the Bituminous Coal Oper-

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves a labor dispute over safety conditions between Gateway Coal Co. and United Mine Workers of America. The questions presented are of considerable importance to the development of federal policy regarding arbitration of safety disputes and enforcement of a contractual duty not to strike.

I

Gateway Coal Co. (the company) owns and operates a large underground coal mine known as the Gateway Mine, in Greene County, Pennsylvania. Some 550 production and maintenance workers, employed by the company, are represented for purposes of collective bargaining by United Mine Workers of America (the union), including its administrative division, District No. 4, and Local No. 6330.

On the morning of April 15, 1971, shortly before the daylight shift at the mine reported for work, a shuttle car operator on the departing midnight shift noticed an unusually low airflow in his section of the mine. His foreman made an anemometer check and discovered an airflow of only 11,000 cubic feet per minute, less than half the normal rate of 28,000 cubic feet per minute.[1]

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ators' Assn., Inc.; and by *Richard D. Godown* and *Myron G. Hill, Jr.*, for the National Association of Manufacturers.

J. Albert Woll, Laurence Gold, Thomas E. Harris, Stephen I. Schlossberg, and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

[1] While this reduced airflow undoubtedly increased the accumulation of coal dust and flammable gas in the mine, it still exceeded the state ventilation requirement of 6,000 cubic feet per minute, Pa. Bituminous Coal Mine Act, Pub. L. 659 (1961), Pa. Stat. Ann., Tit. 52, § 701–242 (b) (1966), and the federal requirement of 9,000 cubic

The company evacuated the men from the mine and ordered the day-shift employees to stand by on the surface. An ensuing investigation revealed that the collapse of a ventilation structure had partially blocked an intake airway. Immediate repairs restored normal airflow, and underground mining operations resumed. In the meantime, however, some 100 of the 226 day-shift employees had disregarded the company's instructions to stand by and had gone home.

The following morning the union requested reporting pay for those employees who did not stand by as ordered on April 15, but the company refused. The union rejected the company's offer to arbitrate this dispute, and the miners on all three shifts walked off the job.

On April 17, pursuant to a union request, state and federal inspectors visited the mine to determine the adequacy of the repairs. The investigation revealed that, although collapse of the ventilation structure apparently occurred between 4 and 4:30 on the morning of April 15, records of the anemometer checks purportedly made by three foremen sometime between 5 a. m. and 8 a. m. disclosed no reduction in airflow.[2] The state inspector impounded the book of entries and notified the company that he would press criminal charges against the three foremen for falsification of the records. The company immediately suspended two of the men but decided against suspension of the third because he had reported the trouble.

On Sunday, April 18, about 200 company miners attended a special union meeting and voted not to work unless the company suspended all three foremen. The

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feet per minute, Federal Coal Mine Health and Safety Act of 1969, § 303 (b), 83 Stat. 767, 30 U. S. C. § 863 (b).

[2] Section 303 (d) (1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U. S. C. § 863 (d) (1), requires such inspections within three hours immediately prior to the beginning of any shift.

company acquiesced in this demand, and the following Monday the miners returned to work. Criminal prosecutions were instituted against the three foremen, and the Pennsylvania Department of Environmental Resources undertook consideration of possible decertification proceedings against them.

On May 29, while the criminal charges were still pending, the company received word from the Department that it was at liberty to return the three foremen to work if it so desired.[3] One of the three had retired during his suspension, but the company reinstated the other two and scheduled them to resume work on the midnight shift on June 1. On that date, miners on all three shifts struck to protest the alleged safety hazard created by the presence of the two foremen in the mines. On June 8, the company formally offered to arbitrate this dispute, but the union refused. Subsequently, the two foremen pleaded *nolo contendere* to the criminal charges for falsification of the records and paid fines of $200 each.

Faced with a continuing strike and a refusal to arbitrate, the company invoked the jurisdiction of the District Court under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185. It argued that the broad arbitration clause of the collective-bargaining agreement governed this dispute and requested an injunction against continuance of the strike. In a temporary restraining order later converted into a preliminary injunction, the District Court required the union to end the strike and to submit the dispute to an

[3] After its investigation, the Department concluded that:

"In view of the satisfactory record and good performance of these foreman [*sic*] in the past and the pending legal action, we feel that no further action should be taken in this matter. The coal company is at liberty to return the three (3) assistant foreman [*sic*] to work if it so desires." App. 16a–17a.

impartial umpire without delay.[4] The order further provided for suspension of the two foremen pending the umpire's decision and prospectively required both parties to abide by his resolution of the controversy.

On appeal, the Court of Appeals for the Third Circuit, with one judge dissenting, reversed the judgment of the District Court and vacated the preliminary injunction.[5] 466 F. 2d 1157 (1972). The court intimated that a special provision of the collective-bargaining agreement involved here might be construed to remove safety disputes from the coverage of the general arbitration clause and reasoned that, in any event, the usual federal policy favoring arbitration of labor relations disputes did not apply to questions concerning safety. *Id.*, at 1159–1160. Relying in part on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, the court found that there was a public policy disfavoring compulsory arbitration of safety disputes. Since it was "neither particularly stated nor unambiguously agreed in the labor contract that the parties shall submit mine safety disputes to binding arbitration," the Court of Appeals concluded that the union had no contractual duty to submit this controversy to arbitration and hence no implied obligation not to strike. 466 F. 2d, at 1159. Perceiving no wrong to enjoin, the court found it unnecessary to consider whether injunctive relief in this case was appropriate under the traditional considerations of equity set forth by this Court in *Boys Markets, Inc.* v.

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[4] The District Court found that the present work stoppage was occasioned by a safety dispute over the reinstatement of the suspended foremen rather than by an economic dispute over reporting pay for April 15.

[5] While the appeal was pending and prior to the Court of Appeals' decision, the impartial umpire rendered his decision in favor of the company and determined, *inter alia*, that the two foremen should be permitted to return to work. 466 F. 2d 1157, 1159.

Retail Clerks Union, 398 U. S. 235 (1970). We granted certiorari, 410 U. S. 953 (1973).

This case presents three questions. First, did the collective-bargaining agreement then in force between these parties impose on them a compulsory duty to submit safety disputes to arbitration by an impartial umpire? Second, if so, did that duty to arbitrate give rise to an implied no-strike obligation supporting issuance of a *Boys Markets* injunction? Third, did the circumstances of this case satisfy the traditional equitable considerations controlling the availability of injunctive relief? We answer all three questions in the affirmative and accordingly reverse the judgment below.

II

No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so. At all times material to this case, the parties were bound by the National Bituminous Coal Wage Agreement of 1968 (the agreement). The section of the agreement entitled "Settlement of Local and District Disputes" [6] provides for resolution of grievances by

[6] This section provides, in relevant part:

"Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the mine committee.

"3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither

direct negotiation between the parties and ultimately, should such negotiations fail, for arbitration by an impartial umpire "mutually agreed upon by the operator or operators affected and . . . the United Mine Workers of America." The section further states that the "decision of the umpire shall be final." This arbitration clause governs disputes "as to the meaning and application of the provisions of this agreement," disputes "about matters not specifically mentioned in this agreement," and "any local trouble of any kind aris[ing] at the mine." Paragraph 3 of the "Miscellaneous" section of the agreement [7] states that both parties "agree and

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the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

"5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement." App. 13a–14a.

[7] Paragraph 3 provides:

"The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts." App. 15a.

affirm . . . that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section . . . ." It excepts from the arbitration obligation only those disputes "national in character."

This arbitration provision appears sufficiently broad to encompass the instant dispute. The contractual obligation reaches "any local trouble of any kind aris[ing] at the mine," and the continued presence in Gateway Mine of two particular foremen is plainly a local issue. On its face, this contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire.

The Court of Appeals avoided this conclusion by reference to an assumed public policy disfavoring arbitration of safety disputes. The majority of that court recognized that the usual federal policy encourages arbitration of labor disputes but reasoned that this presumption of arbitrability applies only to disagreements over "wages, hours, seniority, vacations and other economic matters." 466 F. 2d, at 1159. The court thought that safety disputes should be treated as *sui generis,* and concluded that it should "reject any avoidable construction of a labor contract as requiring final disposition of safety disputes by arbitration." [8] *Id.,* at 1160. We disagree.

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[8] In finding a public policy disfavoring arbitration of safety disputes, the court reasoned as follows:

"Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to

The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203 (d) of the Labor Management Relations Act, 29 U. S. C. § 173 (d), states in part:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In the *Steelworkers* trilogy,[9] this Court enunciated the now well-known presumption of arbitrability for labor disputes:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with posi-

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that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." 466 F. 2d, at 1160.

We find this analysis unpersuasive for the reasons stated in this section of our opinion.

The Court of Appeals also relied on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143. Section 502 provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work" shall not "be deemed a strike under this chapter." On its face, this section appears to bear more directly on the scope of the no-strike obligation than on the arbitrability of safety disputes. Indeed, there is nothing in the legislative history to suggest that § 502 was intended as a limit on arbitration. See 1 Legislative History of the Labor Management Relations Act, 1947, pp. 29, 156, 290, 436, 573, 895 (G. P. O. 1948). For this reason, we reserve our discussion of § 502 until Part III of this opinion. To the extent that § 502 might be relevant to the issue of arbitrability, we find that the considerations favoring arbitrability outweigh the ambiguous import of that section in the present context.

[9] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

> tive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582–583 (1960).

The Court also elaborated the basis for this policy. It noted that commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter "arbitration is the substitute for industrial strife." *Id.*, at 578. A collective-bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts:

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment

> whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs." *Id.*, at 581–582.

We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent.

The Court of Appeals majority feared that an arbitrator might be too grudging in his appreciation of the workers' interest in their own safety. We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust. We also disagree with the implicit assumption that the alternative to arbitration holds greater promise for the protection of employees. Relegating safety disputes to the arena of economic combat offers no greater assurance that the ultimate resolution will ensure employee safety. Indeed, the safety of the workshop would then depend on the relative economic strength of the parties rather than on an informed and impartial assessment of the facts.

We therefore conclude that the "presumption of arbitrability" announced in the *Steelworkers* trilogy applies to safety disputes, and that the dispute in the instant

case is covered by the arbitration clause in the parties' collective-bargaining agreement.[10]

III

The second question is whether the District Court had authority to enjoin the work stoppage. The answer depends on whether the union was under a contractual duty not to strike. In *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970), the Court considered the proper accommodation between the literal terms of § 4 of the Norris-LaGuardia Act [11] and the subsequently

[10] The Court of Appeals also found support for its refusal to order arbitration in § (e) of the collective-bargaining agreement. Section (e) provides for an employee mine safety committee empowered to inspect mine facilities and equipment and to report its findings to the management. If the committee finds an "immediate danger," it may make a binding recommendation to remove all workers from the unsafe area.

Although the Court of Appeals did not state that § (e) was an express exception to the arbitration clause, it evidently believed that the section created an ambiguity in the agreement which had to be resolved against arbitrability. However, as the Court stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra*, "[d]oubts should be resolved in favor of coverage." 363 U. S., at 583. Thus, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *Id.*, at 584–585. Since § (e) clearly does not constitute an express exception to the arbitration clause, it follows that the safety dispute in the instant case must be deemed to fall within the broad arbitration clause.

The dissent maintains that the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, pre-empts the field and "displace[s] all agreements to arbitrate safety conditions." *Post*, at 394. Respondents have not made this contention, and a fair reading of the Act discloses no congressional intention, either express or implied, to accomplish such a drastic result.

[11] "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any

enacted provisions of § 301 (a) of the Labor Management Relations Act.[12] The Court noted the shift in congressional emphasis "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." 398 U. S., at 251. It concluded that § 301 (a) empowers a federal court to enjoin violations of a contractual duty not to strike.

Although the collective-bargaining agreement in *Boys Markets* contained an express no-strike clause,[13] injunctive relief also may be granted on the basis of an implied undertaking not to strike. In *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), the Court held that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes.[14] Indeed, the

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case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment . . . ." 47 Stat. 70, 29 U. S. C. § 104.

[12] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U. S. C. § 185 (a).

[13] 398 U. S., at 239 n. 3.

[14] *Lucas Flour* involved a damages action for breach of the implied no-strike obligation, while the present case involves injunctive relief. The policy reasons favoring the availability of injunctive relief, however, are equally compelling. As the Court stated in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, 248 (1970):

"[A]n award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would

strong federal policy favoring arbitration of labor disputes was the linchpin of this Court's reasoning in *Boys Markets*. Denial of all equitable relief for breaches of no-strike obligations would have carried "devastating implications for the enforceability of arbitration agreements." 398 U. S., at 247. As MR. JUSTICE BRENNAN stated for the Court in that case:

> "[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. . . . Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." *Id.*, at 248. (Citation omitted.)

Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets*. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.

In the present case, the Court of Appeals identified two provisions which it thought excepted safety disputes from the general no-strike obligation. The first is § (e) of the collective-bargaining agreement, which provides for a union mine safety committee at each mine. As

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only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union."

this section was thought central to the outcome of this case, we set forth the relevant provisions in full:

> "The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life [*sic*] and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.
>
> "If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes." App. 12a.

The union contends that this provision reserves to the workers the right to strike over safety disputes and also that the committee's determination of "immediate danger" may be wholly subjective and without foundation in fact. In short, the safety committee may object to any aspect of mine operation as an "immediate danger" and call the workers off the job to force whatever changes it proposes. The union further argues that since the exercise of this option cannot constitute a breach of the collective-bargaining agreement, the District Court had no wrong to enjoin.

We need not decide whether § (e) is subject to such an expansive reading, for, as the District Court found, that section was never invoked in this controversy. The safety committee did inspect the mine to determine the

cause of the ventilation failure, but there was no showing that it ever reported findings or made recommendations to the company management. Nor was there any showing that the committee found conditions dangerous to the "life [*sic*] and bodies of the mine workers" or which, if any, of its members formed the requisite belief in the existence of "an immediate danger."

The Court of Appeals majority apparently believed that the vote by the local membership, the body superior to the union safety committee, constituted substantial compliance with the purpose and intent of § (e) and obviated any need for compliance with the formal procedure. As a matter of simple contractual interpretation, we think that proposition doubtful. Under the union's construction of § (e), the committee's good-faith belief in the existence of an immediate danger, no matter how unfounded that view, is conclusive. The management's only recourse against arbitrary and capricious decisions by the committee is to seek removal of the offending members. Circumvention of the procedures of § (e), including a formal vote by the committee members, thus removes the only deterrent to unreasonable action by the committee. Given this circumstance, one would not lightly assume that failure to follow the specific procedures outlined in § (e) is somehow *de minimis*. In any event, whether the union properly invoked this provision is a substantial question of contractual interpretation, and the collective-bargaining agreement explicitly commits to resolution by an impartial umpire all disagreements "as to the meaning and application of the provisions of this agreement." [15]

[15] Respondents also argue that Paragraph 1 of the "Miscellaneous" section of the agreement disavows any intent to impose a no-strike duty. Paragraph 1 provides:

"1. Any and all provisions in either the Appalachian Joint Wage

The Court of Appeals majority also based its denial of injunctive relief on § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, which provides in part:

> "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

This section provides a limited exception to an express or implied no-strike obligation. The Court of Appeals held that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract." 466 F. 2d, at 1160. We agree with the main thrust of this statement—that a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction.

The Court of Appeals majority erred, however, in con-

Agreement of June 19, 1941, or the National Bituminous Coal Wage Agreement of April 11, 1945, containing any 'no strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." App. 14a.

This paragraph effectively rescinds certain no-strike clauses in two prior agreements. It does not, however, purport to negate any no-strike duty created by the present agreement. As we have noted, the agreement makes arbitration the exclusive and compulsory means for finally resolving disputes. Under *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this arbitration provision gives rise to an implied no-strike duty. We do not think that Paragraph 1 can be fairly construed as an exception to that no-strike duty. Cf. *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346 (CA6 1958) (Stewart, J.), affirmed by an equally divided Court, *sub nom. Mine Workers* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960).

cluding that an honest belief, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of § 502. If the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers. As Judge Rosenn pointed out in his dissent from the judgment below, the difficulty occasioned by this view is especially apparent where, as here, the claim concerns not some identifiable, presently existing threat to the employees' safety, but rather a generalized doubt in the competence and integrity of company supervisors.[16] Any employee who believes a supervisor or fellow worker incompetent and who honestly fears that at some future time he may commit some unspecified mistake creating a safety hazard could demand his colleague's discharge and walk off the job despite the contractual agreement not to do so. Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be. We agree with Judge Rosenn that a union seeking to justify a contractually prohibited work stoppage under

[16] Judge Rosenn contended with justification that a wholly subjective test would open "new and hazardous avenues in labor relations for unrest and strikes." He stated:

"This test will require a court to accept the naked assertion of an employee that the presence of one of his fellow employees in a plant constitutes a safety hazard. If employees may label another employee a working risk and thereupon engage in a work stoppage which, because of its characterization as a safety strike, is unreviewable by arbitration or court, no employer can expect stability in labor relations. Moreover, each employee is the possible victim of the attitudes, fancies and whims of his fellow employees. Unions, themselves, will be at the mercy of 'wildcatters.'" 466 F. 2d, at 1162.

§ 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." 466 F. 2d, at 1162. We find this reading of the statute consistent both with common sense and with its previous application. See, *e. g., Philadelphia Marine Trade Assn.* v. *NLRB,* 330 F. 2d 492 (CA3), cert. denied *sub nom. International Longshoremen's Assn.* v. *NLRB,* 379 U. S. 833 and 841 (1964); *NLRB* v. *Fruin-Colnon Construction Co.,* 330 F. 2d 885 (CA8 1964); *NLRB* v. *Knight Morley Corp.,* 251 F. 2d 753 (CA6 1957), cert. denied, 357 U. S. 927 (1958); *Redwing Carriers, Inc.,* 130 N. L. R. B. 1208 (1961), enf'd as modified, *sub nom. Teamsters Local 79* v. *NLRB,* 117 U. S. App. D. C. 84, 325 F. 2d 1011 (1963), cert. denied, 377 U. S. 905 (1964).

IV

On the facts of this case, we think it clear that § 502 did not deprive the District Court of authority to enforce the contractual no-strike obligation. The union inferred from the foremen's failure to record the reduced airflow on the morning of April 15 that their return to the job created an abnormally dangerous working condition. One may doubt whether this assertion alone could suffice to invoke the special protection of § 502. In any event, the District Court resolved the issue by expressly conditioning injunctive relief on the suspension of the two foremen pending decision by the impartial umpire.

For similar reasons, it is also evident that injunctive relief was appropriate in the present case under the equitable principles set forth in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S., at 254. The District Court found that the union's continued breach of its no-strike obligation would cause irreparable harm to the petitioner. It eliminated any safety issue by suspending the two foremen pending a final arbitral decision.

In these circumstances, we cannot say that the District Court abused its discretion.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I

The dispute in this labor case does not involve hourly wages, pension benefits, or the like. It involves the life and death of the workers in the most dangerous occupation in America.[1] The history of the coal miner is a history of fatal catastrophes, which have prompted special protective legislation.[2] Nor was the mine involved here an exception. It is classified by the United States Bureau of Mines as "especially hazardous," triggering special inspection procedures to insure the safety of the men who work it. Federal Coal Mine Health and Safety Act of 1969, § 103 (i), 83 Stat. 750, 30 U. S. C. § 813 (i). Congress has received testimony about safety problems at this mine in which the workers, a year before this dispute, complained of the supervisors' negligence in safety matters, particularly their practice of "not testing for gas." [3] At those hearings Senator Harrison Williams, the principal author of the 1969 mine safety act, commented that the enforcement performance of the United States Bureau of Mines was "outrageous . . . just plain unbelievable." [4]

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[1] Bureau of Labor Statistics, Injury Rates by Industry, 1970, pp. 3, 6 (Report No. 406, 1972).

[2] S. Rep. No. 91-411, pp. 3-6; H. R. Rep. No. 91-563, pp. 1-3.

[3] Hearings on Health and Safety in the Coal Mines before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 27, 351 (1970).

[4] *Id.*, at 191.

It was in the context of this history that the workers discovered that three of their foremen had negligently failed to check and record the airflow in the mine before the daylight shift began, as was their duty. Instead they made false entries in their log books. As a result, they had not discovered that the airflow in the mine was 11,000 cubic feet per minute rather than the normal 28,000. Reduced airflow can result in a buildup of methane gas, creating conditions for accidental explosions resulting from the operation of normal mining equipment. The workers walked off the job and refused to return unless the foremen were removed. The majority passes off the workers' concern here as only "a generalized doubt in the competence and integrity of company supervisors" as if there were only unfounded fears about a few men in an operation with an exemplary safety record. Yet the foremen in question pleaded *nolo contendere* to state charges of falsifying the records involved in this incident, and their admitted misfeasance is precisely the kind of reckless disregard for the miners' safety which permeates the history of this industry.

In response to this history, the union obtained, in the collective-bargaining agreement in force during this incident, a provision for a union "mine safety committee" with the authority to present the mine operator with a binding "recommendation" that all workers be removed from an unsafe mine area. The agreement provides no recourse for the operator in disagreement with the committee's determinations, although he may subsequently seek removal from the committee of members he believes to have acted arbitrarily. Yet it is clear from this provision that the union reserved to itself the authority to determine that a mine be closed because of safety hazards. Although there is an explicit provision that a dispute over whether a committee member should be removed is arbitrable, there is no such provision for arbitration

if the mine operator disagrees with the committee's recommendation. The inescapable inference, absent any contrary presumption, is that this question is not subject to arbitration.[5] And in what clearly appears to be a buttress to the union's authority in this matter, all no-strike provisions from prior contracts were explicitly excluded from the agreement in question here, which contains no such commitment on the part of the union.

This is the contractual context in which the employer brought this action, under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, to compel arbitration of the safety dispute and enjoin the work stoppage. It is, of course, clearly established that because of congressional policy favoring arbitration of labor disputes, a general arbitration provision, as found in the agreement here in question, is broadly construed. *Steelworkers* trilogy (*United Steelworkers of America* v.

[5] This inference is strengthened by the agreement's provisions for arbitration if the operator objected to recommendations by federal coal mine inspectors. § (b)(2) of the agreement. There would obviously be no need for this special arbitration provision if the parties felt that safety questions could be handled through the regular arbitration machinery.

Indeed the provision in question here has a long history supporting this construction. The 1946 agreement, known as the Krug-Lewis agreement, and arising from President Truman's seizure of the mines in 1946, *United States* v. *United Mine Workers of America*, 330 U. S. 258, expressly permitted union safety committees to initiate safety stoppages, although the Federal Coal Mines Administrator (Capt. N. H. Collisson), was given authority to halt such a stoppage. At hearings following the Centralia mine disaster, resulting in the death of 111 miners, Secretary of the Interior Krug testified that the meaning of the provision "was to give the mine safety committee complete authority to get the men out of the mine, if they felt the mine was unsafe . . . ." Hearings pursuant to S. Res. 98 before a Special Subcommittee of the Senate Committee on Public Lands, 80th Cong., 1st Sess., 312. The predecessor to the current provision appeared in the National Bituminous Coal Wage Agreement of 1947, which deleted Collisson's authority to override the miners.

American Mfg. Co., 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593). This policy is grounded, as the majority points out, in the expression of policy by the Labor Management Relations Act. And once a dispute is determined to be arbitrable, there is an implied agreement by the union not to strike, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, which is enforceable by a federal court injunction under the principles enunciated in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, because of the close relationship between the duty to arbitrate and the duty not to strike. *Lucas Flour, supra*, at 104–106; *Boys Markets, supra*, at 247–249.

Yet this whole scheme, grounded as it is on congressional expression of policy, must allow for any congressionally indicated exceptions to that policy. In a § 301 suit the federal courts are to apply federal law "which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 456. Although the "presumption of arbitrability" might be sufficient in the ordinary case to overcome the contrary implications in the collective-bargaining agreement involved here, I find that presumption seriously weakened in the area of safety disputes by § 502 of the Labor Management Relations Act, 29 U. S. C. § 143, which expressly shields walk-offs by workers concerned for their safety: That section reads in part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." Although there is nothing in the legislative history of this section to shed light on its purpose, the words of the section are themselves fairly clear. They recognize in the law what is in any case an unavoidable principle of

human behavior: self preservation. As Judge Hastie said for the majority in the Court of Appeals: "Men are not wont to submit matters of life or death to arbitration . . . ." 466 F. 2d 1157, 1160.

This is an area involving "the penumbra of express statutory mandates" to be solved "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Lincoln Mills, supra,* at 457. Although there is a general policy favoring arbitration, I do not find that Congress intended to extend that policy here. Application of the "presumption of arbitrability" is not inevitable in every labor dispute. But miners' determination to act to protect their own safety is as inevitable in labor disputes as elsewhere. Absent any presumption, I cannot find that the dispute here was arbitrable or that the union was under any duty not to strike. It follows then, as the Court of Appeals found, that there was no wrong to remedy.

II

Congress in 1969 set up pervasive administrative controls over working and environmental conditions with the coal mines,[6] 83 Stat. 742. The need for a more effective regulatory scheme was described in H. R. Rep. No. 91–563. The 1969 Act states in its findings and purpose that "the first priority and concern of all in the coal mining industry must be the health and safety of

[6] The hazards of various working conditions to the health of workers have been of great concern to Congress, its latest Act being the Occupational Safety and Health Act of 1970, 84 Stat. 1590, which in terms does not exclude employees who are in the coal-mining business. The Act looks toward increasing the quality of the environment in which employees work and of improving the workmen's compensation system under which they are protected. See Brodeur, Casualties of the Workplace, New Yorker, Nov. 19, 1973, p. 87, for an account of the industrial-medical complex that works to keep plants profitable to the owners and dangerous to the workers.

its most precious resource—the miner." § 2 (a), 30 U. S. C. § 801 (a). Ease of investigating mines was insured. The Act provides that when a representative of the miners believes that a violation of a mandatory standard exists and an imminent danger exists, the right of immediate inspection is given the Federal Government. § 103 (g), 30 U. S. C. § 813 (g). The Secretary of the Interior may make a spot investigation of a mine for five working days when he believes hazardous conditions exist. § 103 (i), 30 U. S. C. § 813 (i). Once a hazardous condition is found the Secretary can order that all miners be evacuated from the area and prohibited from entering it. § 104 (a), 30 U. S. C. § 814 (a). The Secretary can abate mining in incipient or potential mining areas, § 105, 30 U. S. C. § 815; and his orders are within limits subject to judicial review by the miners as well as by the operators. § 106, 30 U. S. C. § 816.

Detailed ventilating requirements are placed in the Act, § 303, 30 U. S. C. § 863; and examinations of each mine must be made within "three hours immediately preceding the beginning of any shift." § 303 (d)(1), 30 U. S. C. § 863 (d)(1). Examinations for hazardous conditions must be made at least once a week, § 303 (f), 30 U. S. C. § 863 (f); and weekly investigations of ventilating conditions must be made and various monitors which detect dangerous gases must be installed, § 303 (l), 30 U. S. C. § 863 (*l*). The regulatory scheme covers the subject matter in minute detail.

Penalties run against operators of mines and also against miners who violate in specified ways "mandatory safety standards." Compensation of miners laid off by closed mines is provided, § 110 (a), 30 U. S. C. § 820 (a); and miners are protected against discharge or other discrimination by protests they have made against the operations by testimony they have given. § 110 (b), 30 U. S. C. § 820 (b).

Title IV of the Act treats disability payments and payments for the death of miners. It bolsters state workmen's compensation laws and makes the owners liable, through self-insurance or through liability insurance, where an adequate state law does not exist, § 423, 30 U. S. C. § 933. State laws inconsistent with the federal act are suspended; but state laws which provide more stringent standards or controls survive, § 506, 30 U. S. C. § 955.

A close reading of this Act convinces me that it must displace all agreements to arbitrate safety conditions. It is in that respect a more extreme case than *U. S. Bulk Carriers* v. *Arguelles*, 400 U. S. 351, where we held that a federal statute giving seamen a specific judicial remedy was not displaced by arbitration. When it comes to health, safety of life, or determination of environmental conditions within the mines, Congress has pre-empted the field. An arbiter is no part of the paraphernalia described in the Act. An arbiter seeks a compromise, an adjustment, an accommodation. There is no mandate in arbitration to apply a specific law. Those named in the present Act who construe, apply, and formulate the law are the Secretary and the courts.

Moreover, arbitration awards might compromise administration of the 1969 Act. Rulings of arbiters might not jibe with rulings of the Secretary. Rulings of the arbiters might even color claims for compensation or damages by negativing the very basis of liability either in workmen's compensation Acts or in state lawsuits for damages.

Hence, though I disagree with the way in which the Court reads this particular arbitration clause, I conclude that even though the collective-bargaining agreement is read to authorize arbitration, the 1969 Act precludes it. The 1969 Act specifies the arms of the law which handle these matters of safety of mines. Congress has given arbiters no share of the power.

UNITED STATES *v.* MAZE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72–1168. Argued November 13–14, 1973—
Decided January 8, 1974

Respondent was convicted of violating the federal mail fraud statute, 18 U. S. C. § 1341, by devising a scheme to defraud through unlawfully obtaining possession from one Meredith of a credit card issued by a Louisville bank, which respondent used to obtain goods and services from motel operators in various States knowing that the operators to whom he presented the card for payment would mail the sales slips to the Louisville bank, which would in turn mail them to Meredith. Section 1341 makes it a crime, *inter alia,* for a person who has devised a scheme to defraud or for obtaining money or property by means of false pretenses for the purpose of executing the scheme knowingly to cause to be delivered by mail according to the direction thereon any thing delivered by the Postal Service. The Court of Appeals reversed the judgment of conviction on the ground that § 1341 was inapplicable to respondent's conduct. *Held:* The mailings were not sufficiently closely related to respondent's scheme to bring his conduct within the statute. Though mailings were to be directed to adjusting the accounts between respondent's victims (the motels, the Louisville bank, and Meredith), they were not for the purpose of executing the scheme embraced by the statute since that scheme had already reached fruition when respondent checked out of the motel and did not depend on which of his victims ultimately bore the loss. *Pereira* v. *United States,* 347 U. S. 1; *United States* v. *Sampson,* 371 U. S. 75, distinguished. Pp. 398–405.

468 F. 2d 529, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE, J., joined, *post,* p. 405. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined, *post,* p. 408.

Jewel S. Lafontant argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

William T. Warner, by appointment of the Court, *post,* p. 997, argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In February 1971 respondent Thomas E. Maze moved to Louisville, Kentucky, and there shared an apartment with Charles L. Meredith. In the spring of that year respondent's fancy lightly turned to thoughts of the sunny Southland, and he thereupon took Meredith's BankAmericard and his 1968 automobile and headed for Southern California. By presenting the BankAmericard and signing Meredith's name, respondent obtained food and lodging at motels located in California, Florida, and Louisiana. Each of these establishments transmitted to the Citizens Fidelity Bank & Trust Co. in Louisville, which had issued the BankAmericard to Meredith, the invoices representing goods and services furnished to respondent. Meredith, meanwhile, on the day after respondent's departure from Louisville, notified the Louisville bank that his credit card had been stolen.

Upon respondent's return to Louisville he was indicted on four counts of violation of the federal mail fraud statute, 18 U. S. C. § 1341, and one count of violation of the Dyer Act, 18 U. S. C. § 2312. The mail fraud counts of the indictment charged that respondent had devised a scheme to defraud the Louisville bank, Charles L. Meredith, and several merchants in different States by unlawfully obtaining possession of the BankAmericard issued by the Louisville bank to Meredith, and using the card to obtain goods and services. The indictment charged that respondent had obtained goods and services

at four specified motels by presenting Meredith's Bank-Americard for payment and representing himself to be Meredith, and that respondent knew that each merchant would cause the sales slips of the purchases to be delivered by mail to the Louisville bank which would in turn mail them to Meredith for payment. The indictment also charged that the delay in this mailing would enable the respondent to continue purchasing goods and services for an appreciable period of time.

Respondent was tried by a jury in the United States District Court for the Western District of Kentucky. At trial, representatives of the four motels identified the sales invoices from the transactions on Meredith's Bank-Americard which were forwarded to the Louisville bank by their motels. An official of the Louisville bank testified that all of the sales invoices for those transactions were received by the bank in due course through the mail, and that this was the customary method by which invoices representing BankAmericard purchases were transmitted to the Louisville bank. The jury found respondent guilty as charged on all counts, and he appealed the judgment of conviction to the Court of Appeals for the Sixth Circuit. That court reversed the judgment as to the mail fraud statute, but affirmed it as to the Dyer Act. 468 F. 2d 529 (1972).[1] Because of an apparent conflict among the courts of appeals as to the circumstances under which the

[1] The Court of Appeals determined that even though it affirmed respondent's Dyer Act conviction, for which he had received a concurrent five-year sentence, it should also consider the mail fraud convictions as well. There is no jurisdictional barrier to such a decision, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and the court decided that "no considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony." 468 F. 2d, at 536 n. 6. We agree that resolution of the mail fraud questions presented by this case is appropriate.

fraudulent use of a credit card may violate the mail fraud statute,[2] we granted the Government's petition for certiorari. 411 U. S. 963 (1973). For the reasons stated below, we affirm the judgment of the Court of Appeals.

The applicable parts of the mail fraud statute provide as follows: [3]

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

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[2] The decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Lynn*, 461 F. 2d 759 (1972), appears consistent with the decision of the Sixth Circuit in the instant case. Five other courts of appeals apparently take a contrary view. *E. g.*, *United States* v. *Kellerman*, 431 F. 2d 319 (CA2), cert. denied, 400 U. S. 957 (1970); *United States* v. *Chason*, 451 F. 2d 301 (CA2 1971), cert. denied, 405 U. S. 1016 (1972); *United States* v. *Madison*, 458 F. 2d 974 (CA2), cert. denied, 409 U. S. 859 (1972); *United States* v. *Ciotti*, 469 F. 2d 1204 (CA3 1972), cert. pending, No. 72–6155; *Adams* v. *United States*, 312 F. 2d 137 (CA5 1963); *Kloian* v. *United States*, 349 F. 2d 291 (CA5 1965), cert. denied, 384 U. S. 913 (1966); *United States* v. *Reynolds*, 421 F. 2d 178 (CA5 1970); *United States* v. *Thomas*, 429 F. 2d 407 (CA5 1970); *United States* v. *Kelly*, 467 F. 2d 262 (CA7 1972), cert. denied, 411 U. S. 933 (1973); *United States* v. *Kelem*, 416 F. 2d 346 (CA9 1969), cert. denied, 397 U. S. 952 (1970).

[3] The full text of the section reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

> money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any [matter or thing whatever to be sent or delivered by the Postal Service] shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

In *Pereira* v. *United States*, 347 U. S. 1, 8–9 (1954), the Court held that one "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . . ." We assume, as did the Court of Appeals, that the evidence would support a finding by the jury that Maze "caused" the mailings of the invoices he signed from the out-of-state motels to the Louisville bank. But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute.[4]

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such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

[4] The Government indicates that in 1969 it was estimated that more than 300 million consumer credit cards were in circulation, with annual charges between $40 billion and $60 billion. It was also estimated that, in 1969, 1.5 million cards were lost or stolen, and that losses due to fraud had risen from $20 million in 1966 to $100 million in 1969. Brief for United States 14 n. 2, citing 115 Cong. Rec. 38987 (1969). The mail fraud statute, first enacted in 1872, c. 335, § 301, 17 Stat. 323, while obviously not directed at credit card frauds as such, is sufficiently general in its language to include them if the requirements of the statute are otherwise met.

Under the statute, the mailing must be "for the purpose of executing the scheme, as the statute requires," *Kann* v. *United States*, 323 U. S. 88, 94 (1944), but "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element," *Pereira* v. *United States*, *supra*, at 8. The Government relies on *Pereira*, *supra*, and *United States* v. *Sampson*, 371 U. S. 75 (1962), to support its position, while respondent relies on *Kann* v. *United States*, *supra*, and *Parr* v. *United States*, 363 U. S. 370 (1960).

In *Kann*, *supra*, corporate officers and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As a part of the scheme, the defendants were accused of having fraudulently obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. This Court held that the fraud was completed at the point at which defendants cashed the checks:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." 323 U. S., at 94.

In *Parr*, *supra*, the defendants were charged, *inter alia*, with having obtained gasoline and other products and services for their own purposes by the unauthorized use of a gasoline credit card issued to the school district which employed them. The oil company which furnished products and services to the defendants would

mail invoices to the school district for payment, and the school district's payment was made by check sent in the mail. Relying on *Kann*, the Court again found that there was not a sufficient connection between the mailing and the execution of the defendants' scheme, because it was immaterial to the defendants how the oil company went about collecting its payment.

The defendant in *Pereira, supra,* was charged with having defrauded a wealthy widow of her property after marrying her. The Court describes the conduct of defendant in these words:

> "Pereira asked his then wife if she would join him in the hotel venture and advance $35,000 toward the purchase price of $78,000. She agreed. It was then agreed, between her and Pereira, that she would sell some securities that she possessed in Los Angeles, and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles, and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000 was drawn in favor of Pereira." 347 U. S., at 5.

Thus the mailings in *Pereira* played a significant part in enabling the defendant in that case to acquire dominion over the $35,000, with which he ultimately absconded.[5]

[5] While it is clearly implied in this Court's opinion in *Pereira* that the El Paso bank did not immediately credit the account of the defendant, but instead awaited advice from the Los Angeles bank to which it had mailed the check, the opinion of the Court of Appeals for the Fifth Circuit in *Pereira* makes that fact abundantly clear:

"The return of [the] check from Texas to California constitutes the mailing referred to in the First Count . . . . In mailing the

Unlike the mailings in *Pereira,* the mailings here were directed to the end of adjusting accounts between the motel proprietor, the Louisville bank, and Meredith, all of whom had to a greater or lesser degree been the victims of respondent's scheme. Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss.[6] Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

The Government, however, relying on *United States* v. *Sampson, supra,* argues that essential to the success of any fraudulent credit-card scheme is the "delay" caused by use of the mails "which aids the perpetrator . . . in the continuation of a fraudulent credit card scheme and the postponement of its detection." In *Sampson,* various employees of a nationwide corporation were charged with a scheme to defraud businessmen by obtaining advance fees on the promise that the defendants would either help the businessmen to obtain loans or to sell their businesses. Even after the checks representing the fees had been deposited to the accounts of

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check back to the bank in California on which it was drawn, the El Paso, Texas, bank sent 'instructions to wire fate,' meaning to wire whether the item was paid or not. Upon receiving a telegram stating that the check had been paid, the bank in El Paso gave Pereira its cashier's check for $35,286.01, which Pereira promptly cashed on June 19, 1951." *Pereira* v. *United States,* 202 F. 2d 830, 836 (1953).

[6] MR. JUSTICE WHITE's dissenting opinion indicates that respondent engaged in a "two-week, $2,000 transcontinental spending spree." While we are not sure of the legal significance of the amounts fraudulently charged on the credit card by the respondent, we note that the four counts of mail fraud charged in the indictment were based on charges on Meredith's credit card totaling $301.85. Brief for Respondent 4 n. 2; Brief for United States 4–5.

the defendants, however, the plan called for the mailing of the accepted application together with a form letter assuring the victims that the services for which they had contracted would be performed. The Court found that *Kann* and *Parr* did not preclude the application of the mail fraud statute to "a deliberate, planned use of the mails after the victims' money had been obtained." 371 U. S., at 80.

We do not believe that *Sampson* sustains the Government's position. The subsequent mailings there were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place. But the successful completion of the mailings from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service,[7] which causes the time lag in the physical transmission of such correspondence.[8]

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[7] Since we are admonished that we may not as judges ignore what we know as men, we do not wish to be understood as suggesting that delays in mail service are solely attributable to the distance involved. If the Postal Service appears on occasion to be something less than a 20th century version of the wing-footed Mercury, the fact remains that the invoices were mailed to and were ultimately received by the Louisville bank.

[8] Distance is not the only cause of delay. The Court of Appeals noted that BankAmericard had a billing system in which billing was

Congress has only recently passed an amendment to the Truth in Lending Act[9] which makes criminal the use of a fraudulently obtained credit card in a "trans-

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accomplished by collecting receipts over a one-month period and then billing the card holder. 468 F. 2d, at 535. It might reasonably be argued that respondent himself used facilities of interstate travel for the purpose of executing his scheme, since the large distances separating the defrauded motels from one another and from the Louisville bank probably did make it more difficult to apprehend him than if he had simply defrauded local enterprises in Louisville. But the statute is cast, not in terms of use of the facilities of interstate travel, but in terms of use of the mails.

[9] Volume 84 Stat. 1127, 15 U. S. C. § 1644 provides:

"Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The Court of Appeals felt that the enactment by Congress of the above amendment to the Truth in Lending Act manifested a legislative judgment that credit card fraud schemes were to be excluded from the application of the mail fraud statute "unless the offender makes a purposeful use of the mails to accomplish his scheme." 468 F. 2d, at 536.

Respondent contends that the passage of the amendment indicates that Congress believed in 1970 that credit card fraud was not a federal crime under 18 U. S. C. § 1341 or otherwise. Respondent also notes that the legislative history of the passage of the amendment indicates that the original bill, as enacted by the Senate, contained no jurisdictional amount limitation. The Senate-House conferees, at the request of the Department of Justice, later added the limitation of federal jurisdiction under the section to purchases exceeding $5,000. Brief for Respondent 16–21.

The Government contends that the Court of Appeals erred in attaching significance to the 1970 amendment, urging that there is no indication that Congress intended its provisions to be the sole vehicle for the federal prosecution of credit card frauds. Brief for

action affecting interstate or foreign commerce." 84 Stat. 1127, 15 U. S. C. § 1644. Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme.[10] But it did not do this; instead, it required that the use of the mails be "for the purpose of executing such scheme or artifice . . . ." Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals is

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE joins, dissenting.

I join in the dissent of MR. JUSTICE WHITE which follows but add a few observations on an aspect of the Court's holding which seems of some importance. Section 1341 of Title 18 U. S. C. has traditionally been used against fraudulent activity as a first line of defense. When a "new" fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal

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United States 33–37, citing *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45 (1952).

We deem it unnecessary to determine the significance of the passage of the amendment, since we conclude without resort to that fact that the mail fraud statute does not cover the respondent's conduct in this case.

[10] We are admonished by THE CHIEF JUSTICE in dissent that the "mail fraud statute must remain strong to be able to cope with the new varieties of fraud" which threaten "the financial security of our citizenry" and which "the Federal Government must be ever alert to combat." We believe that under our decision the mail fraud statute remains a strong and useful weapon to combat those evils which are within the broad reach of its language. If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court.

on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil. "Prior to the passage of the 1933 [Securities] Act, most criminal prosecutions for fraudulent securities transactions were brought under the Federal Mail Fraud Statute." Mathews, Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases, 39 Geo. Wash. L. Rev. 901, 911 (1971). Loan sharks were brought to justice by means of 18 U. S. C. § 1341, Lynch, Prosecuting Loan Sharks Under the Mail Fraud Statute, 14 Ford. L. Rev. 150 (1945), before Congress, in 1968, recognized the interstate character of loansharking and the need to provide federal protection against this organized crime activity, and enacted 18 U. S. C. § 891 *et seq.*, outlawing extortionate extensions of credit. Although inadequate to protect the buying and investing public fully, the mail fraud statute stood in the breach against frauds connected with the burgeoning sale of undeveloped real estate, until Congress could examine the problems of the land sales industry and pass into law the Interstate Land Sales Full Disclosure Act, 82 Stat. 590, 15 U. S. C. § 1701 *et seq.* Coffey & Welch, Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth, 21 Case W. Res. L. Rev. 5 (1969). Similarly, the mail fraud statute was used to stop credit card fraud, before Congress moved to provide particular protection by passing 15 U. S. C. § 1644.

The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct. Mail fraud counts fill pages of securities fraud indictments even today. Mathews, *supra*, 39 Geo. Wash. L. Rev., at 911. Despite the pervasive Gov-

ernment regulation of the drug industry, postal fraud statutes still play an important role in controlling the solicitation of mail-order purchases by drug distributors based upon fraudulent misrepresentations. Hart, The Postal Fraud Statutes: Their Use and Abuse, 11 Food Drug Cosm. L. J. 245, 247, 261 (1956). Maze's interstate escapade—of which there are numberless counterparts—demonstrates that the federal mail fraud statute should have a place in dealing with fraudulent credit card use even with 15 U. S. C. § 1644 on the books.

The criminal mail fraud statute must remain strong to be able to cope with the new varieties of fraud that the ever-inventive American "con artist" is sure to develop. Abuses in franchising and the growing scandals from pyramid sales schemes are but some of the threats to the financial security of our citizenry that the Federal Government must be ever alert to combat. Comment, Multi-Level or Pyramid Sales Systems: Fraud or Free Enterprise, 18 S. D. L. Rev. 358 (1973).

The decision of the Court in this case should be viewed as limited to the narrow facts of Maze's criminal adventures on which the Court places so heavy a reliance, and to the Court's seeming desire not to flood the federal courts with a multitude of prosecutions for relatively minor acts of credit card misrepresentation considered as more appropriately the business of the States. The Court of Appeals, whose judgment is today affirmed, was careful to state that "[w]e do not hold that the fraudulent use of a credit card can never constitute a violation of the mail fraud statute." 468 F. 2d 529, 536 (1972). The Court's decision, then, correct or erroneous, does not mean that the United States ought, in any way, to slacken its prosecutorial efforts under 18 U. S. C. § 1341 against those who would use the mails in schemes to defraud the guileless members of the public with

worthless securities, patent medicines, deeds to arid and inaccessible tracts of land, or other empty promises of instant wealth and happiness. I agree with MR. JUSTICE WHITE that the judgment of the Court of Appeals was error and should be reversed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN concur, dissenting.

Until today the acts charged in the indictment in this case—knowingly causing four separate sales invoices to be mailed by merchants to the bank that had issued the stolen BankAmericard in furtherance of a scheme to defraud the bank by using the credit card without authorization and by falsely securing credit—would have been a criminal offense punishable as mail fraud under 18 U. S. C. § 1341.[1] But no more. By misreading this Court's prior decisions and giving an unambiguous federal criminal statute an unrealistic reading, the majority places beyond the reach of the statute a fraudulent scheme that by law is not consummated until after the mails have been used, that utilizes the mails as a cen-

[1] See, *e. g.*, *United States* v. *Kelly*, 467 F. 2d 262 (CA7 1972), cert. denied, 411 U. S. 933 (1973); *United States* v. *Madison*, 458 F. 2d 974 (CA2), cert. denied, 409 U. S. 859 (1972); *United States* v. *Chason*, 451 F. 2d 301 (CA2 1971), cert. denied, 405 U. S. 1016 (1972); *United States* v. *Kellerman*, 431 F. 2d 319 (CA2), cert. denied, 400 U. S. 957 (1970); *United States* v. *Thomas*, 429 F. 2d 407 (CA5 1970); *United States* v. *Kelem*, 416 F. 2d 346 (CA9 1969), cert. denied, 397 U. S. 952 (1970); *Adams* v. *United States*, 312 F. 2d 137 (CA5 1963).

The majority recognizes that prior to this decision at least five courts of appeals had taken a view contrary to that reached by the court below. *Ante*, at 398 n. 2. The Court of Appeals in this case relied upon *United States* v. *Lynn*, 461 F. 2d 759 (CA10 1972), but the indictment in that case did not allege that the plan defrauded the authorized card holder or the credit card issuer.

tral, necessary instrumentality in its perpetration, and that demands federal investigatory and prosecutorial resources if it is to be effectively checked. Because I cannot subscribe to the majority's reasoning or the result it reaches, I dissent.

As "part of his scheme and artifice to defraud," respondent was charged with "obtain[ing] property and services on credit through the use of" an unlawfully possessed BankAmericard and "by means of false and fraudulent pretenses, representations and promises . . . ." App. 5, 6. The property and services were obtained from Citizens Fidelity Bank and Trust Company of Louisville, Kentucky, a BankAmericard licensee, Charles Meredith, the authorized card holder and user, and various persons and business concerns "which had previously entered into agreements with BankAmericard to furnish property and services on credit to the holders of BankAmericards . . . ." *Id.*, at 6. The indictment also charged that the mails played an indispensable role in respondent's fraudulent activities:

> "It was a further part of his scheme and artifice to defraud that the defendant would and did obtain property and services on credit through the use of [the] BankAmericard . . . by charging purchases on credit, well knowing at the time that the bank copies of the sales invoices recording these purchases would be, and were, delivered by mail to Citizens Fidelity Bank and Trust Company, Louisville, Kentucky, according to the directions thereon for posting to the BankAmericard account of Charles L. Meredith, that copies of these sales invoices, together with a bill for the accumulated charges, would subsequently be mailed in the normal course of business to Charles L. Meredith; and that the delay inherent in this posting and mailing would enable

the defendant to continue to make purchases with [the] BankAmericard . . . before his scheme and artifice to defraud could be detected." *Id.*, at 6–7.

I

Section 1341 proscribes use of the mails "for the purpose of executing" a fraudulent scheme. The trial court had instructed the jury that it could convict on the four mail fraud counts only if it found, *inter alia*, that "the mails were in fact used *to carry out* the scheme and that the use of the mails was reasonably foreseeable. The mail matter need not disclose on its face a fraudulent representation or purpose, but need only be intended *to assist in carrying out* the scheme to defraud." App. 37 (emphasis added). Viewing each fraudulent transaction as consummated at the time respondent received goods in exchange for signing the BankAmericard sales drafts, the Court of Appeals held that respondent did not cause the subsequent mailings "for the *purpose* of executing his fraudulent scheme." 468 F. 2d 529, 535 (emphasis in original). The court below acknowledged that "the fraud was directed against the card issuer and the card holder," but it nevertheless concluded that the relevant perspective was respondent's. "As far as [respondent] was concerned, his transaction was complete when he checked out of each motel; the subsequent billing was merely 'incidental and collateral to the scheme and not a part of it.'" *Id.*, at 534, quoting *Kann* v. *United States*, 323 U. S. 88, 95 (1944).

The majority has uncritically embraced this unnecessarily restrictive approach to construing the statute. Like the Court of Appeals, it has selectively seized upon language in our prior decisions in pursuit of its notion that the fraudulent scheme ended when respondent duped

the motels into giving him goods and services on credit. We are told, for example, as in *Kann, supra,* where the mails were used to deliver checks drawn from a dummy corporation as part of a scheme by corporate officers to defraud their own corporation, that the scheme here "had reached fruition," that the person "intended to receive the [goods and services] had received it irrevocably," that it was "immaterial . . . to any consummation of the scheme" how the sales invoices were forwarded by the motels to the issuing bank for payment and billing to the card holder, and that the so-called billing process was, as previously noted, "incidental and collateral to the scheme and not a part of it." 323 U. S., at 94, 95. "Therefore, only if the mailings were 'a part of the execution of the fraud,' or, as we said in *Pereira* v. *United States,* 347 U. S. 1, 8, were 'incident to an essential part of the scheme,' do they fall within the ban of the federal mail fraud statute." *Parr* v. *United States,* 363 U. S. 370, 390 (1960).

What the majority overlooks is the salient fact that the fraud in this case—and most others involving unauthorized use of credit cards—was practiced on the card issuer and not on the individual merchants who furnished lodgings and meals to respondent. As the Court of Appeals itself recognized, "[t]he merchants who honored the BankAmericard were likely insulated from loss under their agreements with BankAmericard. *See* Brandel & Leonard, Bank Charge Cards: New Cash or New Credit, 69 Mich. L. Rev. 1033, 1040 (1971)." 468 F. 2d, at 534 n. 3.[2] Here, then, the fraud was ulti-

[2] Almost all of the bank credit card systems presently in operation in this country rely upon a three-way transaction between the card issuer, the cardholder, and a subscribing retailer. This tripartite credit card arrangement basically entails three separate contractual

mately perpetrated upon the credit card issuer and not the merchant.[3] The mails thus became "part of the execution of the fraud . . . ." *Kann* v. *United States*,

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agreements: (1) between the bank issuing the credit card and the individual cardholder; (2) between one of the banks in the system and a local merchant; and (3) between the merchant and the cardholder. See generally Comment, The Tripartite Credit Card Transaction: A Legal Infant, 48 Calif. L. Rev. 459 (1960).

"The most important of the many parties to such a system is the bank which issues the charge cards to the public. The issuer-bank establishes an account on behalf of the person to whom the card is issued, and the two enter into an agreement which governs their relationship. This agreement establishes a line of credit under which the cardholder may incur obligations to the issuer by a cash advance or through a purchase of goods or services from one of the merchant-members.

"These merchants also have an agreement with the banks requiring them to honor all charge cards issued by a member-bank, and enabling them to deposit slips evidencing sales to cardholders in an ordinary checking account at the bank with which he has reached an agreement in return for a discounted credit to that account. These slips are then cleared and forwarded through an interchange system to the member-bank which originally issued the card and from which the cardholder will be billed periodically. The cardholder must then decide whether to make payment in full within a specified period, free of finance charges, or to defer payment and ultimately be charged an extra percentage of the amount billed." Comment, Bank Credit Cards—Contemporary Problems, 41 Fordham L. Rev. 373, 374 (1972) (footnote omitted).

Because the legal relationship between the parties is dictated by the terms of their respective agreements, the contract governs the distribution of risk for credit card frauds between the merchant and the issuer. Under most systems, with certain exceptions for negligence on the part of the merchant if he honors an expired card or one appearing on the current "stop list" or if he makes a sale for an amount in excess of the cardholder's credit line, the issuer assumes all risks for frauds. Murray, A Legal-Empirical Study of the Unauthorized Use of Credit Cards, 21 U. Miami L. Rev. 811, 813 (1967); Note, Credit Cards: Distributing Fraud

[*Footnote 3 is on p. 413*]

supra, at 95. Indeed, they were "an essential element" and not merely "incident to an essential part of the scheme . . . ." *Pereira* v. *United States,* 347 U. S. 1, 8 (1954).

Nor had respondent's plan reached fruition. For his part, he may very well not have schemed beyond obtaining the goods and services under false pretenses with a stolen credit card. But from a legal standpoint of criminal fraud, this was only the first and certainly

> "not the last step in the fraudulent scheme. It was a continuing venture. . . . The use of the

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Loss, 77 Yale L. J. 1418, 1420 (1968); Comment, The Tripartite Credit Card Transaction, 48 Calif. L. Rev., at 464–465.

"'As far as the merchant is concerned, he is in the same financial and legal position as if he were receiving certified checks on a bank that does not clear at par, with no risk that the check will be returned or payment stopped, or as if he were receiving cash at a small discount for the bank's services. This firm bank commitment is what makes the merchant willing to accept a bank card as freely as cash and what makes the bank card as good as cash to its holder (and without the risks of carrying cash).

"'Under these arrangements, the card-issuing bank takes all the credit risk, which is appropriate to the banking function it performs, the cardholder selects the merchant with whom he will deal, and the bank and the cardholder-purchaser expect the merchant to assume the merchandise risk. It is this division and allocation of risks between merchant and bank which permits the bank card to be used as though it were cash with hundreds of thousands of participating merchants throughout the country and abroad.'" Cleveland, Bank Credit Cards: Issuers, Merchants, and Users, 90 Banking L. J. 719, 723–724 (1973), quoting Statement of the American Bankers Association, the Consumers Bankers Association, Interbank Card Association, and National BankAmericard, Inc. to the Federal Trade Commission in the matter of Revised Proposed Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 4–5 (Mar. 5, 1973).

[3] Section 133 (a) of the Truth in Lending Act limited the cardholder's liability for the unauthorized use of his credit card to $50. 84 Stat. 1126, 15 U. S. C. § 1643 (a).

> mails was crucial to the total success of the fraudulent project. We are not justified in chopping up . . . the scheme into segments and isolating one part from the others. That would be warranted if the scheme were to defraud [only the merchants]. But it is plain that these plans had a wider reach and that but for the use of the mails they would not have been finally consummated." *Kann* v. *United States, supra,* at 96 (DOUGLAS, J., dissenting).

Since it was the card-issuing bank that was actually defrauded, the mails were employed "for the purpose of executing [the] scheme . . . ."

II

The mails further contributed to the realization of respondent's fraudulent scheme by creating the delay in detecting the fraud that necessarily results from the time-consuming processing of credit card invoices by mail. See *United States* v. *Chason,* 451 F. 2d 301, 303–304 (CA2), cert. denied, 405 U. S. 1016 (1971). During his two-week, $2,000 transcontinental spending spree, respondent took full advantage of this inevitable delay to continue his unlawful activities. If the motel owners had employed an instantaneous identification or verification system, respondent's fraudulent scheme would most likely have been nipped in the bud. But the simple truth of the matter is that they did not. As a direct consequence of the prevailing business practice of mailing invoices to the issuer for subsequent billing to the card holder and the system's attendant time delays, respondent was able to buy valuable time to postpone detection and thereby execute his scheme.

The majority mysteriously ignores prior decisions that 18 U. S. C. § 1341 reaches "cases where the use of the mails is a means of concealment so that further frauds

which are part of the scheme may be perpetrated." *Kann* v. *United States, supra,* at 94–95. See *United States* v. *Hendrickson,* 394 F. 2d 807 (CA6 1968), cert. denied, 393 U. S. 1031 (1969); *United States* v. *Riedel,* 126 F. 2d 81, 83 (CA7 1942); *United States* v. *Lowe,* 115 F. 2d 596, 599 (CA7), cert. denied, 311 U. S. 717 (1940). Moreover, it fails to take appropriate account of our most recent decision construing § 1341. In *United States* v. *Sampson,* 371 U. S. 75 (1962), an indictment for mail fraud had been dismissed by the District Court on the ground that the mailings after the money had already been obtained from the victims were not "for the purpose of executing" the scheme to defraud. We reversed.

> "We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes." *Id.,* at 80 (footnote omitted).

As previously indicated, the indictment here charged that respondent knew that the delay inherent in the posting and mailing of the credit card invoices would enable him to continue making purchases with the purloined card before his criminal conduct could be detected. Respondent engaged in a criminal enterprise that is by its very nature short-lived. Every time delay in the

card holder's receipt of the forged credit card slips allows the scheme to continue that much longer. For my part, the indictment charged a crime under 18 U. S. C. § 1341, and the Government established respondent's guilt beyond a reasonable doubt.

III

The majority's decision has ramifications far beyond the mere reversal of a lone criminal conviction. In this era of the "cashless" society, Americans are increasingly resorting to the use of credit cards in their day-to-day consumer purchases. Today well over 300 million credit cards are in circulation, and annual charges exceed $60 billion. In 1969 alone, 1.5 million credit cards were lost or stolen, resulting in fraud losses exceeding $100 million. 115 Cong. Rec. 38987 (1969). Current estimates of annual credit card fraud losses are put as high as $200 million. Cleveland, Bank Credit Cards: Issuers, Merchants, and Users, 90 Banking L. J. 719, 729 (1973). Under the result reached by the majority, only those credit card frauds exceeding $5,000 covered by 15 U. S. C. § 1644 will be subject to federal criminal jurisdiction.

Yet this burgeoning criminal activity, as evidenced by the very facts of this case, does not recognize artificial state boundaries. In the future, nationwide credit card fraud schemes will have to be prosecuted in each individual State in which a fraudulent transaction transpired. Here, for example, respondent must now be charged and tried in California, Louisiana, and Florida. This result, never intended by Congress, may precipitate a widespread inability to apprehend and/or prosecute those who would hijack the credit card system.

I dissent.

MARSHALL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–5881. Argued October 16–17, 1973—Decided January 9, 1974

Petitioner, who had three prior felony convictions, moved for commitment as a narcotic addict pursuant to Title II of the Narcotic Addict Rehabilitation Act of 1966 (NARA), following a fourth felony conviction. The District Court held that the NARA's two-prior-felony exclusion precluded the requested commitment, rejecting petitioner's post-sentence motion to vacate his sentence on the ground that the two-prior-felony exclusion violated equal protection as embodied in the Fifth Amendment. The Court of Appeals affirmed. *Held:* Title II of NARA does not deny due process or equal protection by excluding from rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions, since Congress could rationally assume that an addict with a multiple-felony record is likely to benefit less from rehabilitative treatment, present a possible impediment to the successful treatment of others, and be a greater threat to society upon release, because of that record. Pp. 422–430.

(a) In adopting the two-felony exclusion Congress sought to exclude from NARA treatment (1) those less likely to be rehabilitated thereby and (2) those with a "history of serious crimes." Pp. 423–425.

(b) Congress could reasonably assume that because of the nature of addiction treatment the multiple-felony offender would less likely benefit from and might interfere with a rehabilitation program. Pp. 425, 428.

(c) Congress should have a wide latitude in formulating an experimental program like NARA, involving as it does medical and scientific uncertainties. Pp. 427–428.

(d) In excluding multiple offenders Congress could safeguard that experimental program from possible improper exploitation and also avoid a possible unacceptable risk to society represented by a reduced level of deterrence. Pp. 429–430.

470 F. 2d 34, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ.,

joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 430.

James F. Hewitt, by appointment of the Court, 411 U. S. 914, argued the cause and filed a brief for petitioner.

Jewel S. Lafontant argued the cause for the United States. On the brief were *Solicitor General Bork*, *Assistant Attorney General Petersen*, *Deputy Solicitor General Lacovara*, *Harriet S. Shapiro*, *Jerome M. Feit*, and *Marshall Tamor Golding*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider petitioner's claim that the provisions of Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U. S. C. §§ 4251–4255, deny due process and equal protection by excluding from discretionary rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions. The Circuits are in apparent conflict on this question. See the opinion of the Court of Appeals in this case, *sub nom. Marshall* v. *Parker*, 470 F. 2d 34 (CA9), and *Watson* v. *United States*, 141 U. S. App. D. C. 335, 439 F. 2d 442 (1970); *United States* v. *Hamilton*, 149 U. S. App. D. C. 295, 462 F. 2d 1190 (1972); *United States* v. *Bishop*, 469 F. 2d 1337 (CA1 1972); and *Macias* v. *United States*, 464 F. 2d 1292 (CA5 1972), cert. pending, No. 72–5539.

(1)

Petitioner, Robert Edward Marshall, pleaded guilty to an indictment charging him with entering a bank with intent to commit a felony, in violation of 18 U. S. C. § 2113 (a). At sentencing, petitioner requested that he be considered for treatment as a narcotic addict pursuant to Tit. II of the Narcotic Addict Rehabilitation Act of

1966 (NARA). The sentencing judge, after noting petitioner's prior felony convictions for burglary, forgery, and possession of a firearm, concluded that the exclusion of persons with two prior convictions from the discretionary provisions of the Act as set forth in 18 U. S. C. § 4251 (f)(4)[1] did not permit commitment under

[1] Title 18 U. S. C. § 4253 (a) provides in relevant part that:

"Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter . . . ."

Title 18 U. S. C. § 4251 (f) provides that:

"(f) 'Eligible offender' means any individual who is convicted of an offense against the United States, but does not include—

"(1) an offender who is convicted of a crime of violence.

"(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

"(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided,* That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

"(4) an offender who has been convicted of a felony on two or more prior occasions.

"(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions."

Title 18 U. S. C. § 4251 (d) defines "felony" for purposes of the Act to include

"any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State,

NARA. Petitioner was sentenced to 10 years' imprisonment pursuant to 18 U. S. C. § 4208 (a)(2), but the District Judge recommended that petitioner receive treatment for narcotics addiction while incarcerated.[2]

Ten months after being sentenced, petitioner moved to vacate his sentence under 28 U. S. C. § 2255 on the ground that the two-prior-felony exclusion of NARA under § 4251 (f)(4) violates equal protection as embodied in the Due Process Clause of the Fifth Amendment.

The District Judge took note of *Watson* v. *United States, supra,* but declined to follow that holding. The District Judge also noted that there was no showing, as in *Watson, supra,* that petitioner's prior convictions and his drug addiction were related [3] and since his prior convictions did not relate to traffic in narcotics, the provisions

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any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed."

[2] Prisoners not eligible for treatment under NARA may receive the benefit of programs comparable to those provided under NARA, available to narcotics addicts under administrative processes of the Federal Bureau of Prisons. See generally Drug Abuse Programs Manual, Bureau of Prisons Policy Statement No. 8500.1 (Apr. 20, 1973).

[3] Because the two-prior-felony convictions in *Watson* were for violations of narcotics laws, there was some conjecture that the rationale of that case was limited to its facts. In *United States* v. *Hamilton,* 149 U. S. App. D. C. 295, 462 F. 2d 1190 (1972), the Court of Appeals for the District of Columbia Circuit, the same court which decided *Watson,* dispelled all doubt by holding the two-prior-felony exclusion to be unconstitutional where the defendant has been convicted of one prior narcotics law felony and four prior non-narcotics felony offenses. Subsequently, in *United States* v. *Bishop,* 469 F. 2d 1337 (1972), the Court of Appeals for the First Circuit also held the exclusion of § 4251 (f)(4) to be unconstitutional where the prior felonies were non-narcotics violations.

of 18 U. S. C. § 4251 (f)(2) did not apply. The District Judge determined that, given the purposes of the statute, Congress had not acted arbitrarily in providing different disposition standards for convicted persons with records of prior felony convictions from those without such convictions, these classifications being related to eligibility for rehabilitative commitment under NARA.

The Court of Appeals viewed petitioner's § 2255 petition as a motion under Rule 35 of the Federal Rules of Criminal Procedure for correction of an illegal sentence, and held the statutory classification constitutionally permissible, noting its disagreement with the decisions in *Watson, supra,* and *United States* v. *Hamilton, supra.* Viewing the Act in its entirety,[4] the Court of Appeals concluded that Congress expressly limited the reach of the Act to addicts most likely to be rehabilitated through treatment and provided an exclusion as to convicted persons having two or more prior convictions.

Concluding there is no "fundamental right" to rehabilitation from narcotics addiction at public expense after conviction of a crime, and there being no "suspect" classification under the statutory scheme, the Court of Appeals considered the correct standard to be whether the statu-

[4] In 1966, Congress enacted the Narcotic Addict Rehabilitation Act, Pub. L. 89–793, 80 Stat. 1438. Title I of the Act, 28 U. S. C. §§ 2901–2906, provides for civil rehabilitative commitment prior to trial of persons *charged* with federal crimes, and dismissal of the charges upon successful completion of the treatment. Title II, 18 U. S. C. §§ 4251–4255, provides for similar commitment in lieu of imprisonment for those *convicted* of a federal crime. Title III, 42 U. S. C. §§ 3411–3426, provides for civil commitment of persons not involved in the criminal process. In each case, the court must, after ordering commitment for examination, determine whether the individual is an addict, as defined by the statute, 28 U. S. C. § 2901 (a), 18 U. S. C. § 4251 (a), 42 U. S. C. § 3411 (a), and whether he "is likely to be rehabilitated through treatment," 28 U. S. C. § 2902 (b), 18 U. S. C. § 4253 (a), 42 U. S. C. § 3415.

tory classification bore "some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold,* 383 U. S. 107, 111 (1966); *Dandridge* v. *Williams,* 397 U. S. 471 (1970). The court reasoned that Congress adopted the challenged standards in an effort to restrict eligibility to those most likely to respond to treatment and held that Congress could not be said to have acted irrationally in so doing. The District Court's denial of petitioner's motion to vacate his sentence was affirmed, 470 F. 2d 34 (CA9 1972). We granted certiorari, 410 U. S. 954 (1973). We agree with the District Court's and the Court of Appeals' reading of the statute and affirm.

(2)

Petitioner concedes that the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment, see *Bolling* v. *Sharpe,* 347 U. S. 497 (1954), does not require that all persons be dealt with identically, but rather that there be some "rational basis" for the statutory distinctions made, *McGinnis* v. *Royster,* 410 U. S. 263, 270 (1973), or that they "have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold, supra,* at 111; *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966). See also *James* v. *Strange,* 407 U. S. 128 (1972); *Humphrey* v. *Cady,* 405 U. S. 504 (1972). He argues that no such nexus exists under the classification provided by the challenged statute.

The broad purpose of Congress in enacting NARA, as set forth in the Act itself, was:

> "[T]hat certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civilly committed for confinement and treatment designed to

> effect their restoration to health, and return to society as useful members." 42 U. S. C. § 3401.

See also H. R. Rep. No. 1486, 89th Cong., 2d Sess., 7 (1966), ("to provide for the treatment and rehabilitation of narcotic addicts when they are charged with or convicted of offenses against the United States"); S. Rep. No. 1667, 89th Cong., 2d Sess., 12 (1966). Congress recognized that some relationship between drug addiction and crime probably existed, and concluded that prosecution and imprisonment of all addicts, without more, would not cure addiction or retard the rising addiction rate, and that a rehabilitative rather than a purely penal aproach to the problem was called for. *Id.*, at 13, 17.

It was not the purpose of Congress, however, to make every addict eligible for civil commitment simply by reason of addiction. The congressional intent in adopting the statutory exclusion based on prior convictions which is challenged here is somewhat less explicitly defined,[5] but the objectives emerge clearly when the Act is read as a whole. Having recognized some nexus between drug addiction and crime, Congress specifically sought to insure that any program aimed at providing for the treatment of drug addiction would not hinder

[5] The Act was based on the House-passed Administration bill, H. R. 9167. The two-felony exclusion is derived from that bill, which contained all five of the final exclusions in some form. All of the other House bills considered by the House Committee, but one, also had a two-felony exclusion. See Civil Commitment and Treatment of Narcotic Addicts, Hearings on H. R. 9051, 9159, 9167 and Related Bills before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 1st and 2d Sess., ser. 10, pp. 1–14, 17, 20–53 (1965 and 1966). The Senate bill, S. 2191, did not, however, contain the two-felony exclusion, see S. Rep. No. 1667, 89th Cong., 2d Sess., 7–8 (1966). In conference, where Titles I and II of the House bill were adopted, the two-felony exclusion was incorporated into the final bill. See H. R. Conf. Rep. No. 2316, 89th Cong., 2d Sess., 2–3, 6 (1966); 112 Cong. Rec. 27616 (1966).

traditional efforts to deal effectively with the strictly criminal aspects of the problem.[6] The most explicit statement of congressional intent is found in the House Report:

> "The practical effect of the implementation of the law provided for in the bill, is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed.
>
> . . . . . .
>
> "The definition of 'eligible individual' as set forth in the bill *insures* that the persons considered as candidates for civil commitment *will not include criminals* charged with violent crimes *or be those whose records disclose a history of serious crimes.*"[7] H. R. Rep. No. 1486, pp. 9–10. (Emphasis supplied.)

Similarly, the Senate Report notes:

> "The bill contains sufficient safeguards to assure adequate protection of the general public against the addict who is or may be a hardened criminal, while providing the flexibility necessary to enable

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[6] "After carefully considering the proposed legislation, as amended, the committee finds that it offers a flexible and logical means to provide for the treatment of drug addicts *who are likely candidates for rehabilitation* without essentially changing the authority of law enforcement officials and the courts *to enforce full criminal actions* in appropriate cases." S. Rep. No. 1667, p. 37. (Emphasis supplied.)

[7] Though actually discussing the definition of "eligible individuals" contained in Title I, concerning civil commitment prior to trial, the identical definitions are contained in Title II, and the House Report indicates that there is no difference between the rationale or the language of the various provisions. See H. R. Rep. No. 1486, 89th Cong., 2d Sess., 12, 20 (1966).

> Federal authorities to medically treat the addict who is capable of being cured and rehabilitated . . . ." S. Rep. No. 1667, p. 13.[8]

It is quite clear that in adopting the two-prior-felony exclusion, Congress sought first, to exclude from NARA treatment those less likely to be rehabilitated by such treatment, and second, to exclude those whose records disclosed a "history of serious crimes." The question we are called upon to decide is whether Congress could rationally have assumed that a person who has committed two or more prior felonies and is an addict at the time sentence is to be imposed is likely to be less susceptible of rehabilitation by reason of his past record, thus posing a greater threat to society upon release.

Congress' concern with susceptibility and suitability of multiple offenders to rehabilitative treatment can reasonably be said to derive from its belief that because of the nature of addiction treatment, one who had evidenced greater difficulty in conforming his behavior to societal rules and laws would himself be less likely to benefit from treatment. Additionally, such a person might also pose impediments to the successful treatment of others in the program. As testimony before both the House and

[8] Prior to inclusion of the two-prior-felony exclusion, the Senate Report described the purposes of the restrictions on eligibility by stating:

"The net effect is to confine eligibility for the benefits of the legislation to addicts accused of nonviolent crimes who show good prospects for rehabilitation, while retaining strict criminal punishment for dangerous or hardened offenders, narcotics pushers, and persons with a history of failure to respond to treatment." S. Rep. No. 1667, p. 17.

The bill which emerged from conference included the two-prior-felony exclusion, and the report on that bill merely noted that "the conferees for the Senate felt it reasonable to exclude hardened offenders with serious criminal records and persons who have demonstrated their unsuitability for civil treatment." 112 Cong. Rec. 27616 (1966).

Senate committees revealed, the treatment process for narcotics addiction is an arduous and a delicate undertaking, particularly in the aftercare stage when the subject is released into an unstructured environment which requires from the addict strict obedience to the limitations of the prescribed regime and full cooperation in the rehabilitative efforts.[9]

Additionally, there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts thus remains shrouded in uncertainty. Indeed, even the premise that drug addiction is one of the significant root causes of crime is not without challenge. See generally D. Musto, The American Disease: Origins of Narcotic Control (1973). See also American Bar Association and American Medical Association, Joint Committee on Narcotic Drugs, Drug Addiction: Crime or Disease? (1961). As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts. H. R. Rep. No. 1486, at 51. S. Rep. No. 1667, at 14. The NARA program was therefore fundamentally experimental in nature. See 112 Cong. Rec. 11896–11901 (1966). The suggestion that there is "obscurity" in the holding of this Court in *Powell* v. *Texas*, 392 U. S. 514 (1968), fails to take into account that when courts deal with problems in the administration of criminal law such as those related to drug addiction, alcoholism,

[9] The Senate Report states:

"The process is extremely complex and difficult, involving sustained therapy, principally psychiatric, and perhaps a return to the community in stages, utilizing short visits, a halfway house, a work camp, or some similar facility. . . . In addition, some sanction should be available to enforce the cooperation of the addict in the post-hospitalization period." S. Rep. No. 1667, p. 15.

mental disease, and the like, they are necessarily confined to the existing limits of human knowledge in those areas. As MR. JUSTICE MARSHALL noted in *Powell:*

> "[T]he inescapable fact is that there is no agreement among members of the medical profession about what it means to say that 'alcoholism' is a 'disease.' One of the principal works in this field states that . . . 'alcoholism has too many definitions and disease has practically none.'" *Id.*, at 522.

The holding in *Powell* was a candid acknowledgment that the medical uncertainties afford little basis for judicial responses in absolute terms.

When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo,* that judges with more direct exposure to the problem might make wiser choices. Accordingly, it would have been a permissible choice for Congress to permit discretionary inclusion in NARA programs of those whose prior offenses were determined to be addiction related or motivated. Such a discretion might appropriately have been vested in the trial judge much in the manner in which he is now required to exercise his discretion under § 4252 in determining whether the defendant is an addict who is likely to be rehabilitated through treatment.[10] That Congress has not yet chosen to so provide, however, does not render constitutionally impermissible its decision to limit treatment to those with less than two prior felony convictions. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Dandridge* v.

[10] Some criticism has been directed at the cautious use of the NARA program. See Report by the Comptroller General of the United States to the Congress, Limited Use of Federal Programs to Commit Narcotic Addicts for Treatment and Rehabilitation (1971).

Williams, 397 U. S. 471 (1970); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Jefferson* v. *Hackney*, 406 U. S. 535 (1972).

It should be recognized that the classification selected by Congress is not one which is directed "against" any individual or category of persons, but rather it represents a policy choice in an experimental program made by that branch of Government vested with the power to make such choices. The Court has frequently noted that legislative classifications need not be perfect or ideal. The line drawn by Congress at two felonies, for example, might, with as much soundness, have been drawn instead at one, but this was for legislative, not judicial choice. *McGinnis* v. *Royster*, 410 U. S. 263 (1973); *Powell* v. *Texas*, *supra*, at 539–540 (Black, J., concurring). Against this background, it cannot be said that it was unreasonable or irrational for Congress to act on the predicate reflected in the legislative history and explicitly stated in the exclusion provision of § 4251 (f)(4), that a person with two or more prior felonies would be less likely to adjust and adhere to the disciplines and rigors of the treatment program [11] and hence is a less promising prospect for treatment than those with lesser criminal records.

In addition, Congress might rationally have sought to exclude from NARA treatment centers those it thought might be potentially disruptive elements within the sensitive environment of a drug treatment program.[12] Nor

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[11] Similarly rational was the related congressional choice to give priority of treatment to convicted addicts at an early stage in their lives. Although not invariably so, those with no felony record may well be younger, as a group, than those with multiple convictions, and this notwithstanding that the median age of serious offenders has shown a steady downward trend.

[12] Virtually all drug treatment programs include group therapy and involve extensive personal interaction among those in the treat-

can Congress be said to have acted without reason in determining that an addict with multiple convictions was more "hardened" and thus a greater potential danger to society on early release than the addict who had committed one prior felony or none.

Under NARA, Congress provided for comparatively lenient sentencing possibilities,[13] but in excluding addicts with two prior felonies, it sought to assure that in an essentially experimental program to which limited resources were allocated these features would not be exploited by persons who were viewed by Congress as primarily antisocial and only secondarily addicts.[14] In addition, since the fact of two prior felony convictions may be said to evidence a lesser susceptibility of de-

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ment program. In addition, there are strict institutional rules regarding virtually every aspect of the addict's daily existence which he is expected to follow, and the existence of such authority is considered vital to successful treatment, both in the program itself, and particularly during the aftercare period. See Cole, Report on the Treatment of Drug Addiction, Task Force Report: Narcotics and Drug Abuse, The President's Commission on Law Enforcement and Administration of Justice 135–147 (1967); Petersen, Yarvis & Farkas, The Federal Bureau of Prisons Treatment Program for Narcotics Addicts (1969); Federal Drug Abuse Programs, A Report Prepared by the Task Force on Federal Heroin Addiction Programs and Submitted to the Criminal Law Section of the American Bar Association and the Drug Abuse Counsel 241–278, 393–416 (1972); Vaillant & Rasor, The Role of Compulsory Supervision in the Treatment of Addiction, 30 Fed. Prob. 53–59 (June 1966).

[13] Under 18 U. S. C. § 4253, an individual who is determined to be eligible for NARA treatment is to be committed to the custody of the Attorney General for treatment for "an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed." Title 18 U. S. C. § 4254 then allows for conditional release of an offender, upon the requisite determination, any time after the offender has received six months' treatment. Thereafter, he is legally on parole under the jurisdiction of the Board of Parole, 18 U. S. C. § 4255.

[14] See 112 Cong. Rec. 11813 (1966).

terrence, the reduced level of deterrence implicit in the benign policy of Title II could reasonably be thought by Congress to create an unacceptable risk to society and thus require the exclusion of such persons from NARA disposition.

We therefore hold that Title II of NARA, 18 U. S. C. §§ 4251–4255, does not constitute a denial of due process or equal protection by excluding from rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions.

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

Title II of the Narcotic Addict Rehabilitation Act of 1966 authorizes treatment in lieu of prison sentence for those addicts convicted of an offense against the United States who the sentencing court has determined are "likely to be rehabilitated through treatment." 18 U. S. C. § 4253 (a). Petitioner was denied treatment for his disease of narcotics addiction, even though no determination was ever made that he is not likely to be rehabilitated through treatment, because the Act excludes from consideration for the NARA program any person with two or more prior felony convictions. 18 U. S. C. § 4251 (f)(4). Two courts of appeals have concluded that the two-felony exclusion, though intended by Congress to serve admittedly legitimate ends, is not a sufficiently rational means toward those ends to withstand scrutiny under equal protection principles.[1]

[1] See *Watson* v. *United States*, 141 U. S. App. D. C. 335, 439 F. 2d 442 (1970); *United States* v. *Hamilton*, 149 U. S. App. D. C. 295, 462 F. 2d 1190 (1972); *United States* v. *Bishop*, 469 F. 2d 1337 (CA1 1972). In addition to the statute's flaws noted in this opinion, these decisions also point out other anomalies implicit in the two-felony exclusion. Under the Act, an addict who has engaged in

The Court today, while alluding to some of the statute's serious flaws, nevertheless finds it constitutional. I must respectfully dissent.

In the present case the Court of Appeals analyzed the constitutionality of the two-felony exclusion by focusing on what it perceived to be this Court's two-tiered approach to equal protection issues. See 470 F. 2d 34, 38 (1972). Under this view, classifications involving a "fundamental interest" or "suspect classification" are subject to so-called "strict scrutiny," while all other statutes are tested by a standard of minimal rationality. While the Court today neither expressly endorses nor rejects this approach, its analysis is so deferential as to confirm an earlier observation that, except in cases where the Court chooses to invoke strict scrutiny, the Equal Protection Clause has been all but emasculated. See

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trafficking to support his own habit would be eligible for non-criminal disposition under Tit. II, whereas a nontrafficking addict found, for the third time, in possession of narcotics for his own use would not. This result, "is curiously at odds with the Congressional preoccupation, underlying the Narcotic Addict Rehabilitation Act, with the distinction between traffickers and non-traffickers, and the reiterated purpose that 'strict punishment . . . be meted out where required to the hardened criminal, while justice . . . be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed.'" *Watson* v. *United States, supra,* at 349, 439 F. 2d, at 456. Other anomalies stem from the definition of "felony" in 18 U. S. C. § 4251 (d). "[T]wo persons who both had twice previously committed the identical crime of possession of marijuana might be treated differently under [the two-felony exclusion] simply because one committed his crime in Florida where possession over five grams is a felony and the other committed his in New York where it is only a misdemeanor . . . or because one committed both of his crimes before May 1, 1971, and the other committed them after that date, when the federal offense of marijuana possession was reduced to a misdemeanor for first offenders . . . ." *United States* v. *Bishop, supra,* at 1345.

San Antonio School Dist. v. *Rodriguez*, 411 U. S. 1, 98 (MARSHALL, J., dissenting).[2]

At the outset, then, I must once again take issue with the Court's apparently rigid approach to equal protection issues. See, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471, 519–530 (1970) (MARSHALL, J., dissenting); *Richardson* v. *Belcher*, 404 U. S. 78, 90–91 (1971) (MARSHALL, J., dissenting); *San Antonio School Dist.* v. *Rodriguez*, *supra*, at 98–110 (MARSHALL, J., dissenting). True, as the Court of Appeals found, this case does not fit into any neat "fundamental interest" or "suspect classification" mold. Notwithstanding, I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction,[3] while

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[2] Cf. Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

[3] Drug addiction is specifically referred to as a "disease" in the Senate Report recommending enactment of Pub. L. No. 92–420, 86 Stat. 677, which expanded the NARA program to include methadone maintenance. See S. Rep. No. 92–1071, p. 3 (1972). The most widely accepted and authoritative definition of heroin addiction is one promulgated by the World Health Organization, which lists its characteristics as:

"(1) an overpowering desire or need to continue taking the drug and to obtain it by any means; the need can be satisfied by the drug taken initially or by another with morphine-like properties;

"(2) a tendency to increase the dose owing to the development of tolerance;

"(3) a psychic dependence on the effects of the drug related to a subjective and individual appreciation of those effects; and

"(4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn." *United States* v. *Moore*, 158 U. S. App. D. C. 375, 465–466, 486 F. 2d 1139, 1229–1230 (1973) (Wright, J., dissenting), quoting World Health Organization Expert Committee on

providing treatment and suspension of prison sentence to others similarly situated, should be tested under the same minimal standards of rationality that we apply to statutes regulating who can sell eyeglasses or who can own pharmacies. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, *ante*, p. 156. This case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime.

I press my disagreement no further here, for a careful analysis of the two-felony exclusion and the ends Congress sought to achieve shows that the exclusion is a totally irrational means toward those ends. If deferential scrutiny under the equal protection guarantee is to mean more than total deference and no scrutiny, surely it must reach the statutory exclusion involved in this case.

One of Congress' primary purposes in enacting the two-felony exclusion was to limit treatment to those convicted persons considered most deserving of the special benefits provided by the new law. As the Government argues in its brief, Congress wanted to grant the benefits of treatment to those who "were primarily addicts, and only secondarily criminals." Brief for United States 6. To state the goal more precisely, Congress intended to give treatment to those addicts whose criminal activity was only a symptom or product of their addiction. The

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Addiction-Producing Drugs, Thirteenth Report, World Health Organization Technical Report Series No. 273, p. 13 (1964).

Congress has similarly defined an "addict" to include one "who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U. S. C. § 802 (1).

House Report recognized that "Narcotic addicts in their desperation to obtain drugs often turn to crime in order to obtain money to feed their addiction." H. R. Rep. No. 1486, 89th Cong., 2d Sess., 8 (1966). On the other hand, Congress knew there were others who were first of all criminals, and only secondarily addicts—that is, persons whose criminal activity was independent of their narcotics addiction. It was thought important to preserve strict criminal penalties for such hardened criminals, rather than permit them to use the fact of their addiction to escape punishment for a crime. See 112 Cong. Rec. 11813 (1966).

The plain fact of the matter, however, is that the two-felony exclusion does not further this legislative end, as the following examples demonstrate. Defendant A, with a prior felony conviction for assault with intent to commit murder, is convicted of stealing funds from a national bank. Neither crime was in any way related to narcotics addiction. In fact, A was not even an addict at the time he committed the crimes, but has become an addict during the pendency of his bank theft trial. Defendant B, who has two prior felony convictions for narcotics offenses, is convicted of possession of heroin for his own use. Given the above-stated legislative purpose, one would think that Defendant B, all of whose criminal activity was related to his narcotics addiction, would be eligible for NARA treatment, while Defendant A, none of whose criminal activity was so related, would not be eligible. But just the opposite is true, because of the two-felony exclusion.[4]

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[4] Defendant A would not be excluded from the program under the statutory exclusion of "an offender who is convicted of a crime of violence," 18 U. S. C. § 4251 (f)(1), since that exclusion applies only to a person convicted of a crime of violence in the same proceeding in which Tit. II is considered as an alternative to prison sentence. Thus, if one has just been convicted of a "crime

The problem with the statute is not, as the majority would have it, that Congress chose two felonies as the cutoff point rather than one or three. Rather, the statute fails to achieve the legislative end of discriminating between people who are mainly addicts and those who are mainly criminals because a numerical test was used to achieve a qualitative result for which it was totally unsuited.

A second basic purpose sought to be achieved through the two-felony exclusion was to restrict NARA treatment to those persons deemed likely to be rehabilitated. But the two-felony rule, again, is not a rational means toward that end. To begin with, it must be remembered that the statute itself limits participation in the program to those persons who, after an examination in the custody of the Attorney General, are determined to be addicts "likely to be rehabilitated through treatment." The two-felony exclusion, to the extent it is justified by reference to this policy, amounts to a conclusive and irrebuttable presumption that a person with two or more felony convictions is not likely to be rehabilitated through treatment. We have only recently reiterated that "permanent irrebuttable presumptions have long been disfavored," see *Vlandis* v. *Kline,* 412 U. S. 441, 446 (1973). This is particularly true where an interest as important as personal liberty is at stake. And as one would expect of medical problems in general, whether a particular individual's disease of narcotics addiction is amenable to treatment is the very kind of question which requires an individualized determination.[5]

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of violence" as defined in § 4251 (b), one is disqualified from the program under § 4251 (f)(1), while if one had previously been so convicted but is now convicted of a nonviolent crime, one would be eligible. See *United States* v. *Bishop,* 469 F. 2d, at 1344.

[5] Congressman Celler remarked: "Each individual case must be scrutinized to determine whether civil commitment will be efficacious. I submit that it should not be the Congress who, at long distance,

The two-felony presumption of nonamenability to rehabilitation is also plainly contrary to fact. The Administrator of the California Youth and Adult Corrections Agency pointed out that the two-or-more-felony provision "would result in a great many persons being excluded who might prove to be the best subjects for the program." [6] As he indicated, it was the experience of the California program,[7] upon which the federal program was modeled in large part, that "persons who have had as many as four or five previous convictions and have grown older in years respond to the program better than some of the younger persons earlier in their careers." [8] Nor was any contrary evidence presented to Congress.

Another purpose of the two-felony exclusion was to weed out those violent, antisocial individuals whose

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makes such determinations. In the absence of the facts of individual cases, these decisions can only be arbitrary." See Civil Commitment and Treatment of Narcotic Addicts, Hearings on H. R. 9051, 9159, 9167, and Related Bills before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 1st and 2d Sess., ser. 10, p. 55 (1965 and 1966).

[6] The Narcotic Addict Rehabilitation Act of 1966, Hearings before a Special Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 91 (1966).

[7] See Cal. Welf. & Inst. Code §§ 3050–3054, 3104–3107, and 3109 (1972). The California statute has no exclusion similar to the two-felony exclusion. It is also interesting to note that while the California Act, like the federal Act, excludes persons convicted of certain crimes of violence, see *id.*, § 3052, the statute also provides that even in the case of an offender convicted of a crime of violence, "the judge may request the district attorney to investigate the facts relevant to the advisability of commitment pursuant to this section. In unusual cases, wherein the interest of justice would best be served, the judge may, with the concurrence of the district attorney and defendant, order commitment notwithstanding" the crime-of-violence exclusion. *Id.*, § 3051.

[8] Hearings, *supra*, n. 5, at 153.

participation in the program would interfere with the rehabilitation of others. But again, Congress has drawn a numerical test to achieve a qualitative result for which it is manifestly unsuited. An addict with a prior conviction for attempted murder can participate in the NARA program, while one whose prior record includes two convictions for possession of narcotic drugs cannot.[9]

It makes no sense to deem an addict a "hardened criminal" unworthy or unsuited for treatment simply because he has engaged in criminal activity which may have been the symptom or product of his addiction. Congress enacted NARA because it knew that almost all addicts are hardened criminals in this sense. Not only are they driven to rob and steal in order to obtain money to sustain their habits, but their habits themselves involve the commission of felonies every day of their lives. As the House Report stated, the purpose of the bill was "to treat the unfortunate addict who is capable of rehabilitation to render assistance in a manner which will enable him to extricate himself from an otherwise hopeless and repetitious pattern of addiction and crime." [10] To deny treatment to those addicts who have been convicted of a certain number of felonies, without regard to the relationship between their addiction and the prior offenses, is, in the

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[9] The statute's disregard of all time limits is further evidence of its arbitrary nature. "All prior felonies are counted—whether a joy-ride by a peer-imitating teenager or a rape committed by a 35-year old sex deviate during the pendency of the proceedings in which sentence is about to be imposed. Any intervening period between felonies of good behavior or attempts at rehabilitation are ignored; a person is thought to harden as a criminal merely because he accumulates a fixed number of judgments, regardless of changes in his personality or personal circumstances over time." *United States* v. *Bishop*, *supra*, at 1345.

[10] H. R. Rep. No. 1486, 89th Cong., 2d Sess., 5 (1966).

apt words of Congressman Ryan, like "building a sanatorium to treat tuberculosis, and then refusing admittance to patients with a contagious disease." 112 Cong. Rec. 11812 (1966).[11]

It is argued that the NARA program is essentially experimental in nature, and that courts should therefore be particularly reluctant to interfere with legislative decisions. But this observation must be tempered by a realization that we are experimenting here with people's lives and health. And it can hardly be said that a program now in its seventh year of operation is still basically experimental. Only last year, Congress broadened the NARA program to include methadone maintenance as part of the available rehabilitative treatment, recognizing the many cases of addiction which, though

[11] The majority's contention, see *ante*, at 420 n. 2, that prisoners not eligible for the NARA program are not actually denied treatment because they may receive the benefits of similar programs within the Federal Bureau of Prisons is simply contrary to fact. As the Government itself indicates in its brief, treatment begins immediately upon commitment under NARA, and the offender is eligible for conditional release on parole after six months of treatment. Brief for United States 2 n. 1. Addicts not committed under NARA, however, are not placed in any rehabilitation program until about one year before their anticipated release. *Ibid.* Thus, an addict like petitioner, who received a 10-year sentence, will have to go many years without treatment for his disease because of his exclusion from the NARA program.

More importantly, we are told that the Bureau of Prisons does not have sufficient facilities for treatment of the approximately 5,000 federal prisoners estimated to suffer from some degree of drug dependency. In the Government's own words: "Thus, although commitment under NARA assures treatment, a judicial recommendation for similar treatment at the time an ordinary criminal sentence is imposed does not." *Id.*, at 3 n. 1. Indeed, there is no indication in the record in this case that petitioner has yet received any treatment for his addiction, notwithstanding the sentencing court's recommendation of treatment.

not totally curable, can be maintained in a manner which fosters the individual's social rehabilitation and permits him to become a productive member of society. See Pub. L. No. 92–420, 86 Stat. 677; S. Rep. No. 92–1071 (1972). With the program widened in this fashion, it seems even more irrational to exclude those who might well benefit from the expanded program through the operation of broad and arbitrary exclusions that do not reasonably further any legitimate congressional purposes.

Finally, we must be mindful that the growing concern with treatment of narcotics addicts has not arisen in a legal vacuum, but has paralleled a growing awareness of the Eighth Amendment questions raised when criminal punishment is imposed for activities which are the symptom or direct product of the disease of narcotics addiction.[12] The Court today, by dicta implying that Congress may, consistent with the equal protection concept, deny NARA benefits to persons convicted of narcotics-related offenses because of two prior convictions

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[12] In *Watson* v. *United States*, 141 U. S. App. D. C. 335, 439 F. 2d 442 (1970), it was argued that criminal punishment of an addict for possession of narcotics solely for his own use was impermissible under the Eighth Amendment, but the question was left undecided because not clearly raised before the trial court. See *id.*, at 346, 439 F. 2d, at 453. Plenary consideration of the Eighth Amendment problems of convicting addicts for addiction-related offenses came in *United States* v. *Moore*, 158 U. S. App. D. C. 375, 486 F. 2d 1139 (en banc), cert. denied, *post*, p. 980. Although the defense of addiction was rejected by a 5–4 decision, it now appears that for two members of the majority, the rejection of the Eighth Amendment defense "rested on the availability to the defendant-addict of treatment through NARA." See *United States* v. *Harrison*, 158 U. S. App. D. C. 229, 231, 485 F. 2d 1008, 1010 (1973).

This Court has previously dealt with related issues in *Robinson* v. *California*, 370 U. S. 660 (1962), and *Powell* v. *Texas*, 392 U. S. 514 (1968).

for narcotics-related offenses,[13] only exacerbates these Eighth Amendment problems.

Mr. Justice Jackson, himself a strong opponent of substantive due process, once argued that the vitality of the Equal Protection Clause as a ground for constitutional adjudication is that it "does not disable any governmental body from dealing with the subject at hand." Rather, it merely sends the legislature back to the drawing board to draft a statute which more precisely and more evenhandedly solves the problem. See *Railway Express* v. *New York,* 336 U. S. 106, 112 (1949) (concurring opinion). I would not deny Congress the right to limit the NARA program to persons whose criminal activity was a product of their addiction, to those who were likely to be rehabilitated, or to those whose presence in a treatment center would not interfere with the rehabilitation of others. But I would have Congress make a second attempt at drafting a statute which actually furthers these ends.

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[13] As the majority opinion indicates, petitioner had three prior felony convictions for burglary, forgery, and possession of a firearm, respectively, and there was no attempt to show that his prior convictions related to traffic in narcotics. In addition, there does not appear to have been any showing that petitioner's present conviction for entering a bank with intent to commit a felony was narcotic related. Accordingly, the majority's remarks with respect to Congress' power to exclude from the NARA program persons whose prior and present offenses are addiction related or motivated purport to resolve questions not before us in this case. See *ante,* at 427–428.

Syllabus

COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

No. 72–1040. Argued October 16, 1973—Decided January 9, 1974

The application of appellants (the Communist Party of Indiana, certain of its officers and potential voters, and its candidates for President and Vice President) for a place on the Indiana ballot for the 1972 general election was rejected for failure to submit a statutory loyalty oath stating that the Party "does not advocate the overthrow of local, state or national government by force or violence." Appellants, contending that the statute was unconstitutional, thereupon filed this action in the District Court for injunctive and declaratory relief. On September 28, 1972, a three-judge court declared the statute constitutional and ordered the Election Board to place the Party on the ballot, but only if the required oath was submitted. After a qualified oath submitted by the Party was rejected, appellants on October 3 sought a District Court order directing the Board to accept such oath, and on the same day the Board requested reconsideration of the September 28 order. The next day the District Court denied both motions. On October 10 appellants filed a notice of appeal to this Court, which it later sought to withdraw so that the District Court might act on appellants' motion of the same day that the September 28 order be amended in certain respects. On October 31, the District Court allowed withdrawal of the appeal notice but denied the motion to amend. Appellants refiled their notice of appeal to this Court on November 29, which appellees contend is untimely. *Held:*

1. Appellants' notice of appeal was within the 60-day appeal period prescribed by 28 U. S. C. § 2101 (b), since appellees' October 3 motion for reconsideration suspended the finality of the September 28 judgment until the District Court's denial of such motion on October 4 restored it, so that the time for appeal thus began to run from October 4. Pp. 445–446.

2. The loyalty oath requirement of the Indiana statute violates the First and Fourteenth Amendments. Pp. 446–450.

(a) The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action, applies to state regulation burdening access to the ballot, rights of association in the political party of one's choice, casting an effective ballot, and in running for office, which are interests as substantial as those in other areas that this Court has protected against statutory schemes contrary to the First and Fourteenth Amendments. Pp. 448–449.

(b) For purposes of determining whether to grant a place on the ballot, a group advocating violent overthrow as abstract doctrine need not be regarded as necessarily advocating unlawful action. Pp. 449–450.

Reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed an opinion concurring in the result, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 451.

Sanford Jay Rosen argued the cause for appellants. With him on the brief was *Melvin L. Wulf*.

Theodore L. Sendak, Attorney General of Indiana, argued the cause for appellees. With him on the brief were *Darrel K. Diamond*, Assistant Attorney General, and *A. Frank Gleaves III*, Deputy Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a loyalty oath case. The question for decision is whether the First and Fourteenth Amendments are violated by Indiana's requirement, Ind. Ann. Stat. § 29–3812 (1969), that "[n]o existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the over-

throw of local, state or national government by force or violence . . . ."[1]

Appellants are the Communist Party of Indiana, a new political party in Indiana, certain of its officers and potential voters, and its candidates for President and Vice President in the 1972 election. Appellees are the Indiana State Election Board and its members. When appellants applied to the Election Board in August 1972 for a place on Indiana's National Ballot for the 1972 general election without submitting the required oath, the Board, on the advice of the Attorney General of Indiana, rejected the application. Appellants thereupon filed this action in the District Court for the Northern District of Indiana seeking a declaration of the uncon-

[1] Section 29–3812 reads in pertinent part as follows:

"No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act . . . or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear."

stitutionality of § 29–3812, and an injunction requiring that the Election Board place the Party on the ballot. A three-judge court was convened and that court, on September 28, 1972, in an unreported opinion, declared the provision of § 29–3812 that is challenged on this appeal constitutional and issued an order requiring the Election Board to place the Communist Party and its nominees on the National Ballot only "[i]n the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order. . . ."[2] The Communist Party submitted an affidavit that, in addition to the statutory language, added the following:

> "The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U. S. 298 at 320, 'the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action.'"

The Election Board rejected the affidavit and appellants, on October 3, returned to the District Court, seeking an order directing the Board to accept it. On the same day,

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[2] The District Court's decision of September 28 also decided attacks upon the loyalty oath provision of § 29–3812 made in actions brought by two other new political parties, the American Independent Party and the Indiana Peace and Freedom Party. All three actions challenged, in addition to the "advocacy" provision, the provision of § 29–3812 requiring a party also to file an affidavit that "it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." The September 28 memorandum of the three-judge court declared this provision of § 29–3812 unconstitutional. The American Independent Party and the Indiana Peace and Freedom Party then filed affidavits accepted by the Election Board and were placed on the National Ballot for the 1972 elections. On November 11, the Election Board appealed that portion of the order to this Court. We summarily affirmed. *Whitcomb* v. *Communist Party*, 410 U. S. 976 (1973).

the Election Board filed a motion requesting reconsideration of the order of September 28.[3] The District Court, on October 4, denied both motions by order entered that day. Appellants on October 10 filed a notice of appeal to this Court to enable them to seek emergency relief. That effort was abandoned, and appellants then sought leave of the District Court to withdraw the notice of appeal in order that the District Court might act on a motion of appellants, also filed October 10, that the District Court amend its September 28 order to include a determination that § 29–3812 was constitutional "only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine." On October 31, the District Court entered an order granting leave to withdraw the notice of appeal of October 10 but denying the motion to amend the September 28 memorandum.

Appellants refiled their notice of appeal on November 29. Appellees moved to dismiss the appeal as jurisdictionally untimely, arguing that the 60-day period for appeal, 28 U. S. C. § 2101 (b), expired on November 27. We postponed consideration of the question of our jurisdiction to the merits. 410 U. S. 981 (1973). We hold that the appeal was timely. Appellees' motion for reconsideration of October 3 suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it. Time

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[3] Section 29–3801, Ind. Stat. Ann. (1969), provides for ballot listing of any party that files petitions containing signatures of one-half of one percent "of the total vote of all parties cast in the state for secretary of state at the last preceding general election." The sufficiency of the Communist Party petitions in this respect was challenged by appellees in the District Court but was not discussed in the court's September 28 memorandum although the issuance of the injunction presupposed a decision adverse to appellees. The motion for reconsideration requested the court to reconsider that result.

for appeal thus began to run from October 4 and the notice of appeal filed November 29 was timely.[4] As to the merits, we hold that the loyalty oath requirement of § 29–3812 violates the First and Fourteenth Amendments,[5] and therefore reverse the judgment of the District Court.[6]

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[4] Appellees also argue that the notice of appeal of November 29 was ineffective because the earlier notice of October 10 divested the District Court of jurisdiction and that that jurisdiction could not have been revested by the granting of leave to withdraw the October 10 notice. But since the October 10 notice was clearly timely, that argument is reduced to an attack on the untimeliness under Supreme Court Rule 13 (1) of the filing of the jurisdictional statement on January 26, 1973. Timely docketing of the jurisdictional statement is not, however, a jurisdictional requisite. *Johnson* v. *Florida,* 391 U. S. 596, 598 (1968).

Appellees' brief also invokes § 3 of the Communist Control Act of 1954, 68 Stat. 776, 50 U. S. C. § 842, providing that "[t]he Communist Party of the United States . . . [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . ." We have difficulty understanding appellees' argument that this statute is applicable to the Communist Party of Indiana or in any way relevant to the issues in this case. The statute was not relied upon by either the Election Board, or the District Court when it denied declaratory relief. In any event, insofar as the argument is that this statute bars the Communist Party of Indiana from maintaining this action, it is rejected. See *Communist Party, U. S. A.* v. *Catherwood,* 367 U. S. 389 (1961).

[5] Appellants also contend that the requirement is constitutionally precluded as an oath different from that prescribed for a President by Art. II, § 1, and for any other state or federal officer by Art. VI, cl. 3. See *Cole* v. *Richardson,* 405 U. S. 676 (1972). In view of our result we need not address those contentions.

[6] The only question presented in the jurisdictional statement is whether § 29–3812 is facially valid. Thus, we do not reach the question whether the Election Board's apparent failure to require the Republican and Democratic Parties, the two major parties in Indiana, to comply with the statute rises to the level of a denial of equal protection of the law *as applied,* or was within the Board's

Loyalty oath cases are not strangers to this Court, see Note, Loyalty Oaths, 77 Yale L. J. 739 (1968), but the constitutional questions presented in earlier cases arising from their use to limit access to the ballot have not had plenary consideration.[7] The District Court decided this case under the pressure of a ballot-printing deadline, and its memorandum opinion states no reasons and cites no authorities to support the court's holding that "that portion of the statute providing 'that it does not advocate the overthrow of local, state or national government by force or violence,' is constitutional and hence enforceable by Indiana."

Appellees do not deny that § 29–3812 exacts a broad oath embracing advocacy of abstract doctrine as well as advocacy of action. Yet this Court has held in many contexts that the First and Fourteenth Amendments render invalid statutes regulating advocacy that are not limited to advocacy of action. And, as we have so often emphasized, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438 (1963).

We most recently summarized the constitutional prin-

"prosecutorial discretion." We note, however, that the only relevant testimony in the District Court, given by the Board's clerk, is entirely silent as to the reasons behind the omission.

[7] *E. g., Lisker* v. *Kelley,* 401 U. S. 928 (1971), summarily aff'g 315 F. Supp. 777 (1970); *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951), presenting a constitutional challenge to a Maryland statute imposing a loyalty requirement on candidates for municipal office rested on "the narrowing construction tendered by the Attorney General [of Maryland] during oral argument so as to avoid the constitutional issue that was argued." *Whitehill* v. *Elkins,* 389 U. S. 54, 58 (1967). And *Socialist Labor Party* v. *Gilligan,* 406 U. S. 583 (1972), was dismissed as insufficiently concrete and mature to permit adjudication, on the authority of *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

ciples that have evolved in this area in *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969). We expressly overruled the earlier holding of *Whitney* v. *California*, 274 U. S. 357 (1927), that "without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." 395 U. S., at 447. For, we said:

> "[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957) . . . ." *Id.*, at 447–448.

This principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" has been applied not only to statutes that directly forbid or proscribe advocacy, see *Scales* v. *United States*, 367 U. S. 203 (1961); *Noto* v. *United States*, 367 U. S. 290 (1961); *Yates* v. *United States*,

354 U. S. 298 (1957); but also to regulatory schemes that determine eligibility for public employment, *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961); see also *United States* v. *Robel,* 389 U. S. 258 (1967); tax exemptions, *Speiser* v. *Randall,* 357 U. S. 513 (1958); and moral fitness justifying disbarment, *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957).

Appellees argue that the principle should nevertheless not obtain in cases of state regulation of access to the ballot. We perceive no reason to make an exception, and appellees suggest none. Indeed, all of the reasons for application of the principle in the other contexts are equally applicable here. "To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper* v. *Pontikes, ante,* at 57 (footnote omitted). At stake are appellants' First and Fourteenth Amendment rights to associate with others for the common advancement of political beliefs and ideas. "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Ibid.; Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968). At stake as well are appellants' interests as party members in casting an effective ballot. See *Bullock* v. *Carter,* 405 U. S. 134, 142–144 (1972).

Thus, burdening access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the Party urges others "to *do* something, now or in the future . . . [but] . . . merely to *believe* in something," *Yates* v. *United States, supra,* at 325, is to

infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law. For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964).

Appellees argue: "It is fraudulent for a group seeking by violent revolution to overthrow our democratic form of government to disguise itself as a political party and use the very forms of the democracy it seeks to subvert in order to gain support and carry on its nefarious ends." Brief for Appellees 7. Again, they argue "that the affidavit required under the statute refers to the official actions of the party itself, thus reducing to a minimum any possibility of 'innocent involvement' in activities which might be considered advocacy." *Id.*, at 10. As we understand appellees, this is an argument that, at least for purposes of determining whether to grant a place on the ballot, any group that advocates violent overthrow as abstract doctrine must be regarded as necessarily advocating unlawful action. We reject that proposition. Its acceptance would only return the law to the "thoroughly discredited" regime of *Whitney* v. *California*, 274 U. S. 357 (1927), unanimously overruled by the Court in *Brandenburg* v. *Ohio*, 395 U. S., at 447, 449.[8]

Reversed.

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[8] Cf. *Noto* v. *United States*, 367 U. S. 290, 298 (1961), a prosecution under the Smith Act, 18 U. S. C. § 2385, where we held that the constitutional limitations require that criminal advocacy by the Communist Party be proved by "some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in the result.

I concur in the result. In my view it was quite unnecessary to reach the issue addressed by the Court.

It was established at trial that appellees had certified the Democratic and Republican Parties despite the failure of party officials to submit the prescribed affidavits under Ind. Ann. Stat. § 29–3812 (1969).[1] In *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), this Court held that a discriminatory preference for established parties under a State's electoral system can be justified only by a "compelling state interest." In the present case, no colorable justification has been offered for placing on appellants burdens not imposed on the two established

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fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." See also *Scales* v. *United States*, 367 U. S. 203 (1961); *Yates* v. *United States*, 354 U. S. 298 (1957).

[1] The complaint in this case expressly alleged that § 29–3812 subjected appellants to burdens not imposed on the Republican and Democratic Parties, and proof at trial was directed to that issue. The Court now maintains that this issue cannot be considered because it was not expressly raised in the jurisdictional statement. *Ante*, at 446–447, n. 6. Supreme Court Rule 15 (1) (c) provides, however, that the jurisdictional statement "will be deemed to include every subsidiary question fairly comprised therein" and that "questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The issue of discriminatory application of the statute certainly falls within the gravamen of appellants' jurisdictional statement and should therefore be considered. See, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 371–372 n. 4 (1967). Moreover, the appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief. This consideration applies even though such grounds are not raised in the jurisdictional submissions. *Boynton* v. *Virginia*, 364 U. S. 454, 457 (1960). Cf. *Barr* v. *Matteo*, 355 U. S. 171, 172 (1957).

parties.[2] It follows that the appellees' discriminatory application of the Indiana statute denied appellants equal protection under the Fourteenth Amendment.[3]

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[2] The Court's intimation that a prima facie case of constitutional deprivation was not established because Board officials were "silent as to the reasons behind the omission" of the established parties from the affidavit requirement (*ante*, at 447 n. 6) misses the point. Nothing more need be shown than that the statute was in fact discriminatorily applied. It is the Board officials, not the appellants, who must then come forth with reasons justifying the discriminatory application of the statute.

[3] In view of this patently unconstitutional application of the statute, there is no occasion to reach the broader issue addressed by the Court today. Although I express no conclusion on that issue, it should be noted that this is the first case touching upon the type of oath which may be required of a candidate for the office of President of the United States. The Indiana oath, of course, is required of the party rather than its presidential candidate. But it could be argued that *Yates* v. *United States*, 354 U. S. 298 (1957), and its progeny are not controlling here. Under Art. VI, cl. 3, all state and federal officers are bound by oath "to support this Constitution," and under Art. II, § 1, cl. 8, the President must swear that he will "faithfully execute the Office . . . and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 3, also imposes on the President the affirmative duty to "take Care that the Laws be faithfully executed." Neither the effect of these explicit constitutional obligations nor the responsibility of a chief executive official of government to enforce the rule of law was a relevant issue in any of the *Yates* line of cases. Cf. *Cole* v. *Richardson*, 405 U. S. 676 (1972).

Syllabus

NATIONAL RAILROAD PASSENGER CORP. ET AL. *v.* NATIONAL ASSOCIATION OF RAILROAD PASSENGERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1289. Argued November 12, 1973—Decided January 9, 1974

Respondent brought this action to enjoin discontinuance of certain passenger trains on the ground that such discontinuance was prohibited by the Rail Passenger Service Act of 1970 (Amtrak Act). The District Court dismissed the action on the ground that respondent lacked standing under § 307 (a) of the Amtrak Act, which confers jurisdiction on federal district courts to grant equitable relief on petition of the Attorney General or, in a case involving a labor agreement, on petition of any affected employee, including authorized employee representatives, if Amtrak or any railroad acts inconsistently with the Act or fails to discharge its responsibilities thereunder. The Court of Appeals reversed, holding that respondent did have standing and that § 307 (a) does not otherwise bar such a suit by an allegedly aggrieved private party. *Held:* Section 307 (a), in light of its express language, and the legislative history of that provision and of the Act as a whole, provides the exclusive remedies for breaches of any duties or obligations imposed by the Act, and no additional private cause of action to enforce compliance with the Act can properly be inferred. Pp. 455–465.

154 U. S. App. D. C. 214, 475 F. 2d 325, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, *post*, p. 465. DOUGLAS, J., filed a dissenting opinion, *post*, p. 466. POWELL, J., took no part in the consideration or decision of the case.

E. Barrett Prettyman, Jr., argued the cause for petitioners. On the brief were *William O. Bittman, Curtis E. Von Kann*, and *Charles A. Horsky*.

Gordon P. MacDougall argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, the National Association of Railroad Passengers (NARP), brought this action in the District Court to enjoin the announced discontinuance of certain passenger trains that had previously been operated by the Central of Georgia Railway Co. (Central). Named as defendants were Central, its parent, Southern Railway Co. (Southern), and the National Railroad Passenger Corp. (Amtrak), all of which are the petitioners in this Court. The question before us is whether this action is maintainable under applicable federal law.

After the enactment of the Rail Passenger Service Act of 1970 (Amtrak Act), 84 Stat. 1327, 45 U. S. C. § 501 *et seq.*, Central contracted with Amtrak for the latter to assume Central's intercity rail passenger service responsibilities.[1] Southern has not entered into any contract with Amtrak. The train discontinuances that precipitated this action were announced by Amtrak pursuant to § 404 (b)(2) of the Amtrak Act, 45 U. S. C. § 564 (b)(2).[2] The gravamen of the respondent's com-

**Paul Rodgers* and *Sumner J. Katz* filed a brief for the National Association of Regulatory Utility Commissioners as *amicus curiae* urging affirmance.

[1] Section 401 of the Act, 45 U. S. C. § 561, authorizes Amtrak to contract with any railroad to undertake its entire responsibility for intercity rail passenger service. Upon entering such a contract, a railroad can discontinue any intercity passenger train by merely filing a 30-day notice of intent with the Interstate Commerce Commission, in accordance with the notice requirements of § 13a of the Interstate Commerce Act, 49 U. S. C. § 13a.

[2] Except in certain limited situations not here pertinent, 45 U. S. C. § 564 (b)(2) authorizes Amtrak to discontinue any passenger service,

plaint was that these discontinuances are not authorized by, and in fact are prohibited by, the Amtrak Act.[3] The District Court concluded that the respondent lacks standing under § 307 of the Amtrak Act, 45 U. S. C. § 547, and accordingly dismissed the action. The Court of Appeals reversed and held that the respondent has standing and that § 307 does not otherwise bar such a suit by a private party who is allegedly aggrieved.[4] We granted certiorari to decide whether such a private cause of action can be maintained in light of § 307 (a) of the Amtrak Act. 411 U. S. 981 (1973).

In this Court and in the Court of Appeals, the parties have approached the question from several perspectives. The issue has been variously stated to be whether the Amtrak Act can be read to create a private right of action to enforce compliance with its provisions; whether a federal district court has jurisdiction under the terms of

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other than that contained in a "basic system" designated by the Secretary of Transportation, upon its own initiative.

[3] The respondent's position on the merits is based on the fact that Central, which entered a contract with Amtrak, is a subsidiary of Southern, which did not enter a contract with Amtrak. The respondent contends that the contract between Amtrak and Central does not comply with § 401 (a) (1) of the Amtrak Act because Southern, the parent company, has not contracted with Amtrak. Since § 401 (a) (1) authorizes only a contract for Amtrak to undertake a railroad's *entire* responsibility for intercity rail passenger service, the respondent contends that Southern cannot relieve itself of only *part* of this responsibility by allowing a subsidiary to contract with Amtrak while declining itself to do so. Accordingly, the respondent argues that Southern and Central, having entered no statutorily authorized contract with Amtrak, are prohibited by § 404 (a), 45 U. S. C. § 564 (a), from discontinuing any passenger train before January 1, 1975.

[4] The decision of the District Court is unreported. The opinion of the Court of Appeals appears at 154 U. S. App. D. C. 214, 475 F. 2d 325 (1973).

the Act to entertain such a suit; and whether the respondent has standing to bring such a suit. Because the reference in each instance is to § 307 (a) of the Act and the legislative history behind that provision, these questions overlap in the context of this case even more than they ordinarily would. But, however phrased, the threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

The respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners. It follows that support for the bringing of this action must be found, if at all, within the four corners of that Act. The only section of the Act that authorizes any suits to enforce duties and obligations is § 307 (a), which provides:

> "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected

> thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat." 45 U. S. C. § 547 (a).

In terms, § 307 (a) purports only to confer jurisdiction, not to create a cause of action. The legislative history, however, makes clear that the congressional purpose was to authorize certain types of suits for the enforcement of the Act's provisions. The House Report explained the section as follows:

> "Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation. In the case of labor agreements, individual employees or duly authorized employee representatives may sue for equitable relief." H. R. Rep. No. 91–1580, p. 9 (1970).

In light of the language and legislative history of § 307 (a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement." Thus, no authority for the action the respondent has brought can be found in the language of § 307 (a). The argument is made, however, that § 307 (a) serves only to *authorize* certain suits against Amtrak and that it should not be read to *preclude* other private causes of action for the enforcement of obligations imposed by the Act. The respondent claims that railroad passengers are the intended beneficiaries of the Act and that the courts should therefore imply a private cause of action whereby they can enforce compliance with the Act's provisions. See *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431–432 (1964). It goes without saying,

however, that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.

A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307 (a) are the exclusive means to enforce the duties and obligations imposed by the Act. But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger* v. *Commissioner*, 311 U. S. 83, 88 (1940). Accordingly, we turn to the legislative history of § 307 (a).

The original draft of § 307 (a) differed from its present form in several respects. It conferred upon federal district courts jurisdiction to entertain suits against Amtrak (but not individual railroads) "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby . . . ."[5] At the hearings of the House

[5] Supplemental Hearings on H. R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–62, p. 44 (1970).

Committee, representatives of organized labor took issue with certain aspects of the draft provision and proposed several changes. One of these proposals would have authorized suits against the railroads as well as Amtrak. Another would have authorized private suits by "any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation." In support of the latter proposal, one labor spokesman testified:

> "The . . . amendment we propose would modify the language of section 307 (a) . . . so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law.
>
> . . . . . .
>
> *"As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring such actions."* Supplemental Hearings on H. R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–62, p. 134 (1970) (emphasis added).

The Secretary of Transportation, who was to be the primary administrative officer responsible for the implementation of the Act, sent a letter to the Subcommittee chairman commenting on these proposed changes. His letter stated that he did not object to allowing suits against railroads as well as Amtrak.[6] As to the proposal

[6] Although the Secretary did not oppose this amendment, he expressed the opinion that it might be unnecessary to make sanctions applicable to any railroad in light of other, existing statutes and in light of Amtrak's amenability to suit under § 307 (a) as it was then written.

to amend the bill to permit suits by any "aggrieved person," however, he stated:

> "Sanctions are normally imposed by the Government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees adversely affected, to seek equitable relief." Hearings, *supra*, at 85.

Thereafter, the Committee redrafted § 307 (a) in conformity with the Secretary's recommendations. The Committee's redraft and the bill as finally enacted authorized suits against railroads as well as Amtrak, and permitted suits involving labor agreements by "duly authorized employee representatives" as well as by affected employees, but did *not* authorize suits by "any person adversely affected or aggrieved."

Both the Secretary of Transportation and the representatives of organized labor thus interpreted § 307 (a) in its present form as precluding private actions other than those specifically authorized therein. Although the transcript of the House Committee hearings does not indicate that any Committee member voiced explicit affirmative agreement with this interpretation, it is surely most unlikely that the members of the Committee would have stood mute if they had disagreed with it. Especially in light of the Secretary's substantial role in the eventual implementation of the Act,[7] we cannot conclude that his interpretation of its draft provisions was not accorded significant weight by the Committee.

The members of the Committee had before them a specific proposal that would have altered the interpretation that was being placed on § 307 (a), and would have

[7] See, *e. g.*, 45 U. S. C. §§ 521, 522, 548 (c), 563 (a), 602, 621, and 645 (1970 ed. and Supp. II).

explicitly permitted suit to enforce the Act's provisions by "any person adversely affected or aggrieved." The Committee's deliberate failure to adopt that proposal, after learning of the Secretary's views, cannot but give weight to the conclusion that the Committee agreed with the Secretary's interpretation of the meaning and effect of the existing language, as well as with his opposition to the proposed change. These factors are substantial indicia that the legislators understood that § 307 (a) as written would preclude private causes of action to enforce compliance with the Act, other than in the limited area of cases "involving a labor agreement." We have found no contrary indication in any of the hearings or committee reports. Thus, the explicit legislative history of § 307 (a), such as it is, serves to support the same interpretation of its language that would be accorded by settled rules of statutory construction.

This construction of § 307 (a) is also completely consistent with the Act as a whole and with its more generalized legislative history. In outlining the purpose of the Amtrak Act, the House Report, referring to a comment by the Secretary of Transportation, noted that "[i]n order to achieve economic viability in a basic rail passenger system, . . . there will have to be a 'paring of uneconomic routes.'" H. R. Rep. No. 91–1580, p. 3 (1970). Thus, Congress concluded that "a rational reduction of present service will be required in order to save *any* passenger service." *Ibid.* (emphasis in original). In § 404 of the Act, Congress provided an efficient means whereby Amtrak could eliminate uneconomic routes (other than a "basic system" designated and from time to time augmented by the Secretary of Transportation) without the necessity of submitting to the time-consuming proceedings of state regulatory bodies or the Interstate Commerce Commission that had been required

before the Act's passage.[8] If, however, § 307 (a) were to be interpreted as permitting private lawsuits to prevent the discontinuance of passenger trains, then the only effect of the Act in this regard would have been to substitute the federal district courts for the state or federal administrative bodies formerly required to pass upon proposed discontinuances.[9]

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[8] See n. 2, *supra*.

[9] Before 1958, railroads desiring to discontinue uneconomic passenger routes were required to secure the permission of state regulatory commissions. In 1958, in an effort to reduce losses on passenger train operations, Congress enacted § 13a of the Interstate Commerce Act, 49 U. S. C. § 13a, which gave the railroads the option of bypassing state agencies and petitioning the Interstate Commerce Commission for permission to discontinue passenger trains. Under § 13a, after the railroad has filed a notice of discontinuance with the Commission, an aggrieved person may file a complaint. Either upon such complaint or on its own initiative, the Commission may institute an investigation of the proposed discontinuance. If the Commission does begin an investigation, it may delay the discontinuance for as long as four months. If it finds that the discontinuance is contrary to the public interest, the Commission may require the continuance of the route for a period of one year. Orders approving or disapproving proposed discontinuances are subject to judicial review. See, *e. g.*, *Southern R. Co.* v. *North Carolina*, 376 U. S. 93 (1964). If, on the other hand, the Commission decides that the discontinuance is clearly permissible under § 13a of the Act, and decides not to conduct an investigation or decides to terminate an investigation already begun, an aggrieved person has no recourse to the courts to review the Commission's decision. *New Jersey* v. *United States*, 168 F. Supp. 324 (NJ 1958), aff'd, 359 U. S. 27 (1959); *City of Chicago* v. *United States*, 396 U. S. 162 (1969).

Thus, if the Commission takes no action on a complaint by a passenger, under § 13a there is no recourse to the courts. Only if the Commission conducts an investigation and issues an order, a procedure that Congress explicitly eliminated for routes subject to the Amtrak Act but outside the basic system, is judicial review available. It thus appears that the Amtrak Act has in effect substituted, in matters covered by that statute, the scrutiny of the Attorney General for that of the Commission under § 13a. Just as

If the respondent's view of the Act were to prevail, a private plaintiff could secure injunctive process to prevent the discontinuance of an "uneconomic" passenger train *pendente lite,* which would force Amtrak to continue the train's operation and to incur the resulting deficits and dislocations within its entire system while the court considered the propriety of the proposed discontinuance.[10] Since suits could be brought in any district through which Amtrak trains pass and since there would be a myriad of possible plaintiffs, the potential would exist for a barrage of lawsuits that, either individually or collectively, could frustrate or severely delay any proposed passenger train discontinuance. Even if one court eventually upheld the discontinuance, its judgment would not control a suit brought in another district and would not, in any event, obviate the loss in the interim of substantial sums and the diversion of rolling stock from more heavily traveled routes. This would completely undercut the efficient apparatus that Congress sought to provide for Amtrak to use in the "paring of uneconomic routes." It would also produce the anomalous result of a discontinu-

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an aggrieved passenger has no access to the courts when the Commission, under § 13a, takes no action on a complaint, so likewise under the Amtrak Act an aggrieved passenger has no access to the courts when the Attorney General has refused to object to a proposed passenger train discontinuance by bringing an action under § 307 (a) to enjoin it. There is no reason apparent from the Amtrak Act, its legislative history, or its underlying purposes to think that Congress intended to create a private remedy substantially equivalent to one that had been eliminated under pre-existing federal law.

[10] That this is a very real possibility is demonstrated by Amtrak's experience in *Wood* v. *National Railroad Passenger Corp.,* 341 F. Supp. 908 (Conn. 1972), where the court granted and then extended a temporary restraining order while it considered the merits of a challenge to a proposed discontinuance. The restraining order was dissolved when Amtrak prevailed on the merits.

ance procedure under the Act considerably less efficient than that which existed before, since there would no longer be a single forum that could finally determine the permissibility of a proposed discontinuance. In the place of the state or federal regulatory bodies, the Congress would have substituted any and all federal district courts through whose jurisdictions an Amtrak train might run.

Congress clearly did not intend to replace the delays often inherent in the administrative proceedings contemplated by §13a of the Interstate Commerce Act with the probably even greater delays inherent in multiple federal court proceedings.[11] Instead, it clothed the Attorney General with the exclusive (except in cases involving labor agreements) authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act. In light of the substantial scrutiny to which Amtrak operations are subject by both Congress and the Executive, Congress could quite rationally suppose that this remedy will effectively prevent and correct any Amtrak breaches of obligations under the Act.[12]

For these reasons we hold that § 307 (a) provides the exclusive remedies for breaches of any duties or obliga-

[11] The Amtrak Act was in significant part a response to congressional dissatisfaction with the administrative delays inherent in passenger route discontinuances under existing legislation. As the Senate Report observed, "trains which clearly served no useful purpose were either required to be kept in operation or were allowed to be discontinued only after protracted administrative and judicial proceedings." S. Rep. No. 91–765, p. 2 (1970). It is evident that Congress intended to eliminate the possibility of such "protracted proceedings" from the procedures it created in § 404 of the Act for efficient discontinuance of uneconomic routes.

[12] See 45 U. S. C. § 644, authorizing the Comptroller General to audit Amtrak's books and records, and § 548, requiring periodic reports to Congress and to the President concerning Amtrak's operations.

tions imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred.[13] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring in the result.

Although I am in agreement that the legislative history of the Amtrak Act provides a clear and convincing expression of Congress' intent to preclude anyone except the Attorney General and in certain situations an employee or his duly authorized representative from maintaining an action under the Act against petitioners, I would leave open the question whether a private suit for mandamus under 28 U. S. C. § 1361 might be maintained against the Attorney General if his refusal to act under § 307—even though within the letter of his authority—went "beyond any rational exercise of discretion." *United States ex rel. Schonbrun* v. *Commanding Officer, Armed Forces,* 403 F. 2d 371, 374 (CA2 1968); see Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 333–335 (1967).

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[13] Since we hold that no right of action exists, questions of standing and jurisdiction become immaterial. In finding that the respondent had standing, the Court of Appeals relied primarily upon *Data Processing Service* v. *Camp,* 397 U. S. 150 (1970). In finding jurisdiction, the court relied upon 28 U. S. C. § 1337.

MR. JUSTICE DOUGLAS, dissenting.

discontinuance procedures contained in 49 U. S. C. § 13a. 45 U. S. C. § 501 *et seq.*, authorized the creation of Amtrak to provide intercity rail passage. With "the expectation that the rendering of such [rail] service along certain corridors [could] be made a profitable commercial undertaking," the Act established Amtrak as a private-for-profit corporation. 45 U. S. C. § 541; H. R. Rep. No. 91–1580, p. 1 (1970). Amtrak has until January 1, 1975, to tender a contract to a railroad to release the latter of its entire responsibility for the provision of intercity rail passenger service. 45 U. S. C. § 564 (a). Unless a railroad has a contract with Amtrak to render the service, it may not discontinue intercity passenger service prior to January 1, 1975, "the provisions of any other Act, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, a Federal or State court, agency, or authority to the contrary notwithstanding." *Ibid.* Those intercity services are not yet a part of "the basic system" put together by Amtrak, a system which by § 202 of the Act is unique in the sense that it "shall not be reviewable in any Court."[1] 45 U. S. C. § 522.

Our problem concerns, not "the basic system" created by Amtrak, but what were called on oral argument the "excess" lines that, absent a contract with Amtrak, are

[1] Amtrak may eliminate service which is part of the "basic system" only by filing notice with the ICC in accordance with the pre-Act discontinuance procedures contained in 49 U. S. C. § 13a. 45 U. S. C. § 564 (b) (3). Rail service which is undertaken by Amtrak on its own initiative but which is not part of the basic system may be discontinued at any time. 45 U. S. C. § 564 (b) (2). Excess lines, however, even though undertaken by Amtrak on its own initiative become part of the basic system and thus subject to the ICC discontinuance procedures if operated by Amtrak for a continuous period of two years. 45 U. S. C. § 563 (a).

under a congressional mandate not to discontinue "any intercity passenger train whatsoever prior to January 1, 1975." 45 U. S. C. § 564 (a).

The Court phrases the question in terms of whether a "right of action" exists, saying that no question of "standing" or "jurisdiction" is presented. Whatever the merits of the distinction between these three concepts may be in some situations, the difference here is only a matter of semantics. The District Court dismissed the cause for lack of "standing." The Court of Appeals reversed, ruling that there was "standing." The parties argue the case on the basis of "standing." Even the Solicitor General who appeared as *amicus curiae* in support of granting the petition for certiorari conceives of the issue in terms of "standing." By the Court's own admission this is not a case where all judicial review is foreclosed. For § 307 (a), 45 U. S. C. § 547 (a), does create a cause of action. May that cause of action be enforced by passengers or only by the Attorney General or by individual employees or railroad unions? Standing of passengers to sue or the existence of a cause of action in passengers is identical in that posture of the case.

Whatever the semantics, the question is whether respondent, National Association of Railroad Passengers, a national organization of railroad patrons, may bring this action to enjoin the discontinuance by Central of Georgia Railway Co.[2] of passenger trains between

[2] Central is a subsidiary of Southern Railway Co. While Central has entered into a contract with Amtrak to relieve it of responsibility for all intercity passenger service, Southern has not. Whether that failure of Southern bars the discontinuance of this passenger-train service goes to the merits of the complaint, was not passed upon below, and has no relevance to the question of standing to sue, the only issue before us.

Savannah and Atlanta, Georgia, and between Albany, Georgia, and Birmingham, Alabama.

Section 307 (a), 45 U. S. C. § 547 (a), gives the Attorney General of the United States and employees under labor agreements the power to obtain from a district court equitable relief against either Amtrak or any railroad acting in violation of the Act.[3] Petitioners argue that § 307 (a) restricts suits to the Attorney General and to employees. That seems a strained construction. The most I think that can be drawn from the words of § 307 (a) and the legislative history is that Congress wanted to make sure that some federal agency had some oversight over the public activity of this private-for-profit corporation. Hence the grant of standing, or cause of action, to the Attorney General. Moreover, it took out of the penumbra of aggrieved persons, employees having rights under collective agreements. Congress left untouched 28 U. S. C. § 1337 which provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

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[3] Title 45 U. S. C. § 547 (a) provides: "If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

Aggrieved passengers are the most obvious complainants when it comes to saving passenger trains from extinction. Certainly passengers of discontinued trains suffer injury in fact and are within the zone of interests protected by the Amtrak Act and thus satisfy two of the three requirements of *Data Processing Service* v. *Camp*, 397 U. S. 150. As to the third—that judicial review has not been precluded—it seems as plain to me as it did to the Court of Appeals. Where as here there is no express denial of judicial review, the test is whether "nonreviewability can fairly be inferred." *Barlow* v. *Collins*, 397 U. S. 159, 166. And, since judicial review "is the rule, and nonreviewability an exception which must be demonstrated," preclusion of judicial review "is not lightly to be inferred." *Ibid.* "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141.

The grant of jurisdiction to the Attorney General to screen state voting right procedures that might have a discriminatory effect did not, we held in *Allen* v. *State Board of Elections*, 393 U. S. 544, deprive individual citizens of standing to sue.

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the *subdivisions thereof*. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements." *Id.*, at 556–557 (footnotes omitted).

The Attorney General is a busy person; and it is not credible to believe that a grant of power to him to sue precludes the standing of passengers who are the prime casualties when passenger service is discontinued.

Each case involving the availability of judicial review stands on its own feet. In *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, we denied judicial review since the collective-bargaining right was being protected by a neutral agency, the National Mediation Board. There is no such body standing between the passengers and Amtrak. Amtrak is a private-for-profit corporation which is only construing its own enabling Act. If passengers are denied standing to sue, Amtrak is largely on its own. Especially is this so in light of the Attorney General's own view that the grant of power in § 307 (a) is limited and does not authorize him to seek correction of all violations of the Act.[4] So far as I can ascertain the Attorney General has not intruded in any case.[5] To leave the complete over-

[4] In refusing to become involved in the case consolidated with this one in the Court of Appeals, the Attorney General's Office expressed the view that "the statutory mandate of section 307 (a) [45 U. S. C. § 547 (a)] does not give the Attorney General the authority to sue for a construction of the Act or to enjoin a purely technical violation." Letter from Assistant Attorney General L. Patrick Gray III to Congressman John Slack, Nov. 19, 1971, in Brief for Respondent 29, 30.

[5] As the Court of Appeals noted, the petitioners "have been unable to refer us to a single instance in which the Attorney General has either instigated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue." *Potomac Passengers Assn.* v. *Chesapeake & Ohio R. Co.,* 154 U. S. App. D. C. 214, 227, 475 F. 2d 325, 338 (1973). On oral argument respondent informed us of two instances in which it obtained injunctive relief against rail service discontinuance after the Attorney General declined to act.

sight to employees is to make nonreviewable most of Amtrak's decisions. Congress specifically did that when it came to "the basic group" of carriers. But its mandate not to discontinue passenger service until January 1, 1975, except on a contract with Amtrak is clear. If in that interim there can be no policing of the Act, we have given a corporation which is private and operating for a profit, an administrative absolution we seldom have been willing to conclude that Congress has bestowed even on federal agencies. I cannot believe the Congress had any such purpose.

We deal here with a federal cause of action and it is the judicial tradition "for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457. The fact that a private suit to enforce a federal law is not specifically sanctioned by Congress seldom means that standing to sue is foreclosed. The purpose of the Amtrak Act was to preserve and improve train service. The object was not to protect trains *per se* nor to create an *in rem* action. The purpose, which the Court in its dedication to legalisms overlooks, was to protect the people who ride the trains. The case is very much on all fours with *J. I. Case Co.* v. *Borak,* 377 U. S. 426, where Congress made it unlawful to solicit proxies in violation of rules prescribed by the Securities and Exchange Commission. No standing, no cause of action was expressly given stockholders who might suffer from corporate action pursuant to a deceptive proxy solicitation. Yet we held that the Commission was not granted an exclusive role to play in policing the area:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most

> effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it." *Id.*, at 432.

The Court is in the mood to close all possible doors to judicial review so as to let the existing bureaucracies roll on to their goal of administrative absolutism. When the victims of administrative venality or administrative caprice are not allowed even to be heard, the abuses of the monsters we have created will become intolerable. The separation of powers was designed to provide, not for judicial supremacy, but for checks and balances. When we turn back this respondent, we turn back passengers who are the victims of the present transportation debacle. Those who complain are not adventurers who seek personal aggrandizement as do jackals who historically have fattened on some economic debacles. The passengers are the victims of the transportation crisis out of which Amtrak seeks to make a fortune. These passengers should be heard. They satisfy the stringent test we laid down in *Baker* v. *Carr*, 369 U. S. 186; they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . ." *Id.*, at 204.

I would affirm the judgment of the Court of Appeals whether the rationalization be based on standing, cause of action, or jurisdiction.

SCHMIDT, DIRECTOR OF WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, ET AL. *v.* LESSARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73–568. Decided January 14, 1974

The three-judge District Court's order, in a class action challenging the constitutionality of the Wisconsin statutory scheme for involuntary commitment of mental patients, that "judgment be and hereby is entered in accordance with the Opinion heretofore entered," which opinion stated that appellees were entitled to injunctive relief against further enforcement of "the present Wisconsin scheme," is sufficient as an order "granting" an injunction to invoke this Court's appellate jurisdiction under 28 U. S. C. § 1253. *Gunn* v. *University Committee*, 399 U. S. 383, distinguished. For purposes of plenary judicial review, however, the court's order does not satisfy the requirements of Fed. Rule Civ. Proc. 65 (d) that an order granting an injunction "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ."

349 F. Supp. 1078, vacated and remanded.

PER CURIAM.

In October and November 1971, appellee Alberta Lessard was subjected to a period of involuntary commitment under the Wisconsin State Mental Health Act, Wis. Stat. § 51.001 *et seq.* While in confinement, she filed this suit in the United States District Court for the Eastern District of Wisconsin, on behalf of herself and all other persons 18 years of age or older who were being held involuntarily pursuant to the Wisconsin involuntary-commitment laws, alleging that the statutory scheme was violative of the Due Process Clause of the Fourteenth Amendment. Jurisdiction was predicated on 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983. Since both declara-

tory and injunctive relief were sought, a District Court of three judges was convened, pursuant to 28 U. S. C. § 2281.

After hearing argument and receiving briefs, the District Court filed a comprehensive opinion, declaring the Wisconsin statutory scheme unconstitutional. 349 F. Supp. 1078. The opinion concluded by stating that

> "Alberta Lessard and the other members of her class are entitled to declaratory and injunctive relief against further enforcement of the present Wisconsin scheme against them. . . . [Miss Lessard] is also entitled to an injunction against any further extensions of the invalid order which continues to make her subject to the jurisdiction of the hospital authorities." *Id.*, at 1103.

Over nine months later, the District Court entered a judgment, which simply stated that

> "It is Ordered and Adjudged that judgment be and hereby is entered in accordance with the Opinion heretofore entered . . . ."

The defendant-appellants now seek to invoke the appellate jurisdiction of this Court, pursuant to 28 U. S. C. § 1253. That statute provides that

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In response, the appellee has filed a motion to dismiss the appeal for want of jurisdiction. Relying upon this Court's decision in *Gunn* v. *University Committee to End the War*, 399 U. S. 383, she claims that the District

Court's judgment did not constitute "an order granting or denying" an injunction.

In *Gunn,* a statutory three-judge court had found a Texas breach of the peace statute unconstitutional. There, as here, the opinion of the District Court concluded by stating that the plaintiffs "are entitled to . . . injunctive relief." *University Committee to End the War* v. *Gunn,* 289 F. Supp. 469, 475 (WD Tex.). The District Court in *Gunn,* however, entered no further order or judgment of any kind; the concluding paragraph of the opinion was the only mention of injunctive relief. Thus, we concluded that we lacked jurisdiction to hear the appeal under 28 U. S. C. § 1253, because of the total absence of any order "granting or denying" an injunction.

Although the language of the District Court opinion here parallels that in *Gunn,* there is thus an important distinction between the two cases. While the record in *Gunn* was devoid of any order granting injunctive relief, there was in the present case a judgment entered "in accordance with the Opinion." Since the opinion of the District Court by its own terms authorizes the granting of injunctive relief to the appellee, we believe that the judgment here is sufficient to invoke our jurisdiction under 28 U. S. C. § 1253.

Yet, although sufficient to invoke our appellate jurisdiction, the District Court's order provides a wholly inadequate foundation upon which to premise plenary judicial review. Rule 65 (d) of the Federal Rules of Civil Procedure provides, in relevant part:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."

The order here falls far short of satisfying the second and third clauses of Rule 65 (d). Neither the brief judgment order nor the accompanying opinion is "specific" in outlining the "terms" of the injunctive relief granted; nor can it be said that the order describes "in reasonable detail . . . the act or acts sought to be restrained." Rather, the defendants are simply told not to enforce "the present Wisconsin scheme" against those in the appellee's class.

As we have emphasized in the past, the specificity provisions of Rule 65 (d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 74–76; *Gunn, supra,* at 388–389. See generally 7 J. Moore, Federal Practice ¶ 65.11; 11 C. Wright & A. Miller, Federal Practice and Procedure § 2955.[1] Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.[2]

[1] The record in this case suggests that a good deal of confusion has been engendered by the absence of a specific injunctive order. About six months after the opinion in this action was entered, the appellee submitted a memorandum to the District Court, alleging numerous instances of "noncompliance" with the decision and requesting affirmative judicial relief. No action was taken on this request, and, on July 18, 1973, both the appellee and the appellants joined in a "Motion to Reconvene for Clarification of Opinion." That motion outlined the uncertainty that had followed the District Court's original opinion, and asked the court to "clarify" its precise holdings. The District Court has taken no action on this joint motion, perhaps because of the subsequent filing of a notice of appeal.

[2] "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly

The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. *Gunn, supra,* at 388. We can hardly begin to assess the correctness of the judgment entered by the District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.

Hence, although the order below is sufficient to invoke our appellate jurisdiction, it plainly does not satisfy the important requirements of Rule 65 (d). Accordingly, we vacate the judgment of the District Court and remand the case to that court for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS dissents.

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one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.,* 389 U. S. 64, 76.

VACHON *v.* NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 73-573. Decided January 14, 1974

On the basis of evidence that a 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at a store operated by him, appellant was convicted of "wilfully" contributing to the delinquency of a minor in violation of a New Hampshire statute. The New Hampshire Supreme Court affirmed. *Held:* An independent examination of the trial record pursuant to Supreme Court Rule 40 (1) (d) (2) discloses that evidence is completely lacking that appellant personally sold the girl the button or that he was aware of the sale or present in the store at the time, a fatal void in the State's case that was not filled by appellant's concession at trial that he "controlled the premises" at the time. A conviction based on a record completely lacking any relevant evidence as to a crucial element of the offense charged violates due process.

113 N. H. 239, 306 A. 2d 781, reversed and remanded.

PER CURIAM.

A 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at the Head Shop in Manchester, New Hampshire. In consequence, appellant, operator of the shop, was sentenced to 30 days in jail and fined $100 after conviction upon a charge of "wilfully" contributing to the delinquency of a minor in violation of New Hampshire's Rev. Stat. Ann. § 169:32 (Supp. 1972).[1] In affirming the conviction, the New Hampshire Supreme Court held that the "wilfully" component of the offense required that the State prove that the accused acted " 'voluntarily and intentionally and not

[1] The statute provides in pertinent part:

"[A]nyone . . . who . . . has knowingly or wilfully done any act to . . . contribute to the delinquency of [a] child, may be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both."

because of mistake or accident or other innocent reason.' " 113 N. H. 239, 242, 306 A. 2d 781, 784 (1973). Thus, the State was required to produce evidence that appellant, knowing the girl to be a minor,[2] personally sold her the button, or personally caused another to sell it to her. Appellant unsuccessfully sought dismissal of the charge at the close of the State's case on the ground that the State had produced no evidence to meet this requirement, and unsuccessfully urged the same ground as a reason for reversal in the State Supreme Court. We have reviewed the transcript of the trial on this issue, pursuant to Rule 40 (1)(d)(2) of the Rules of this Court.[3]

Our independent examination of the trial record discloses that evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time. The girl was the State's only witness to the sale. She testified that she and a girl friend entered the store and looked around until they saw "a velvet display card on a counter" from which they "picked out [the] pin." She went to some person in the store with the button "cupped in [her] hand" and paid that person 25 cents for the button. She did not say that appellant was that person,

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[2] The complaint charged that appellant "did wilfully contribute to the delinquency of a minor by selling or causing to be sold a button with obscene material with slogan on same, to wit, 'Copulation Not Masturbation' to . . . a minor child of the age of 14 years, knowing the said child was a minor . . . ."

[3] The Rule provides, in pertinent part, that: "Questions not presented according to [the requirements of this rule] will be disregarded, save as the court, at its option, may notice a plain error not presented." This discretion has been long acknowledged, see *Columbia Heights Realty Co.* v. *Rudolph,* 217 U. S. 547 (1910), recently affirmed in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 320 n. 6 (1971), and extends to review of the trial court record, see *Sibbach* v. *Wilson & Co.,* 312 U. S. 1 (1941). See also *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

or even that she saw him in the store. Rather, she testified that she could not identify who the person was. We therefore agree with Justice Grimes, dissenting, that "there is no evidence whatever that the defendant sold the button, that he knew it had been sold to a minor, that he authorized such sales to minors or that he was even in the store at the time of the sale." 113 N. H., at 244, 306 A. 2d, at 785. This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26." That concession was evidence at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.

In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Harris* v. *United States,* 404 U. S. 1232, 1233 (1971). (DOUGLAS, J., in chambers); *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *Johnson* v. *Florida,* 391 U. S. 596 (1968); see also *Adderley* v. *Florida,* 385 U. S. 39, 44 (1966).

The judgment is reversed and the case is remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

Appellant Denis M. Vachon operates the Head Shop in Manchester, New Hampshire, where he sells various beads, dresses, posters, and the like. In July 1969, a 14-year-old girl, accompanied by her girl friend, went to the shop seeking to purchase a button or pin like the

one purchased by her friend the previous week. She found the button, inscribed "Copulation Not Masturbation," and purchased it from a salesperson in the store. It was conceded in the New Hampshire courts that appellant was in control of the premises where the sale was made. At a jury-waived trial, appellant was convicted of contributing to the delinquency of a minor, a statutory offense proscribed in these words:

> "[A]nyone . . . who shall knowingly or wilfully encourage, aid, cause, or abet, or connive at, or has knowingly or wilfully done any act to produce, promote, or contribute to the delinquency of [a] child, may be punished . . . ." N. H. Rev. Stat. Ann. § 169:32 (Supp. 1972).

The Supreme Court of New Hampshire affirmed appellant's conviction. 113 N. H. 239, 306 A. 2d 781 (1973).

The Court decides that appellant's conviction under this statute violates rights secured to him by the Due Process Clause of the Fourteenth Amendment, concluding on the basis of its "independent examination of the trial record" that "evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time."

I

In one sense there can be no doubt that the Court's conclusion is based upon an "independent examination of the trial record," since the claim sustained here was neither made in constitutional form to the Supreme Court of New Hampshire, nor even presented by appellant in his jurisdictional statement in this Court.*

*Appellant makes two contentions in his jurisdictional statement: First, that the New Hampshire statutes defining contributing to the delinquency of a minor and sale and delivery of obscene material (N. H. Rev. Stat. Ann. §§ 571–A:1, 571–A:2 (Supp. 1972)) have been

A litigant seeking to preserve a constitutional claim for review in this Court must not only make clear to the lower courts the nature of his claim, but he must also make it clear that the claim is constitutionally grounded. *Bailey* v. *Anderson*, 326 U. S. 203 (1945). The closest that appellant came in his brief on appeal to the Supreme Court of New Hampshire to discussing the issue on which this Court's opinion turns is in the sixth section (at 17–18), which is headed: "The State's failure to introduce any evidence of scienter should have resulted in dismissal of the charge following the presentation of the State's case." Appellant in that section makes the customary appellate arguments of insufficiency of the evidence and does not so much as mention either the United States Constitution or a single case decided by this Court. The Supreme Court of New Hampshire treated these arguments as raising a classic state law claim of insufficient evidence of scienter; nothing in that court's opinion remotely suggests that it was treating the claim as having a basis other than in state law.

The Court purports to decide the scienter question on the basis of Rule 40 (1)(d)(2) of the Rules of this Court, which provides:

> "1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—
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> . . . . .
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> "(d)(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari,

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applied to the sale of the button by appellant in a way that infringes upon his First and Fourteenth Amendment rights; and, second, that the New Hampshire statute defining contributing to the delinquency of a minor is unconstitutionally vague. There is simply nothing else presented by the jurisdictional statement.

> but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

The very language of this rule makes it clear that it applies to this Court's review of cases in which it has previously either noted probable jurisdiction or granted certiorari. The cases cited by the Court in support of what it does here are therefore necessarily cases in which review had been granted and which had been orally argued; in addition, each of those cases arose in the federal courts. See *Columbia Heights Realty Co.* v. *Rudolph,* 217 U. S. 547 (1910); *Sibbach* v. *Wilson & Co.,* 312 U. S. 1 (1941); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313 (1971).

Whatever the import of Rule 40 (1)(d)(2) in cases arising in the federal courts, it surely does not give this Court the power to simply ignore the limitations placed by 28 U. S. C. § 1257 on our jurisdiction to review final judgments of the highest court of a State. That jurisdiction permits review in this Court by appeal where a state statute has been upheld against a federal constitutional challenge, or by writ of certiorari where a federal constitutional challenge is "specifically set up or claimed" in state court. Our prior cases establish that we will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969). See *Crowell* v. *Randell,* 10 Pet. 368 (1836). Since the Supreme Court of New Hampshire was not presented with a federal constitutional challenge to the sufficiency of the evidence, resolution of this question by the Court is inconsistent with the congressional limitation on our

jurisdiction to review the final judgment of the highest court of a State.

II

Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on *Thompson* v. *Louisville*, 362 U. S. 199 (1960), I would nonetheless be unable to join in the Court's disposition of it. In *Thompson*, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right of appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which Thompson was convicted. This Court therefore had no choice but to engage in its own construction of the statute and upon doing so it concluded that the record was "entirely lacking in evidence to support any of the charges." *Id.*, at 204. *Thompson* was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction.

Here, however, the Supreme Court of New Hampshire construed the state statute defining contributing to the delinquency of a minor, and held that the evidence adduced at the trial was sufficient to support a finding on each element of that offense. While the Supreme Court of New Hampshire did say, as the Court indicates, that the State was required to prove that the accused acted " 'voluntarily and intentionally and not because of mistake or accident or other innocent reason,' " 113 N. H., at 242, 306 A. 2d, at 784, it said this in a context of several paragraphs of treatment of the elements of the offense. Just as those reading and relying upon our opinions would

be ill-advised to seize one phrase out of context, I think we are ill-advised to so treat the opinion of the Supreme Court of New Hampshire. That court had several observations to make about the statutory offense which bear on the issue of "wilfulness" upon which this Court focuses:

> "It is uncontested that the defendant was in control of the premises where the sale was made. There was evidence that a girl friend of this minor had previously purchased there a pin 'like that.' These pins were displayed on a card on a counter. The trial court saw the minor and had an opportunity to conclude whether her minority should have been apparent to whoever sold the pin. The court could find that the defendant was aware of the character of the pins which were being offered for sale and sold in his establishment.
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> "Defendant is charged with wilfully contributing to the delinquency of a minor by selling or causing to be sold to her the button in question. To act wilfully is 'to act voluntarily and intentionally and not because of mistake or accident or other innocent reason.' [Citations omitted.] The trial court could properly find and rule that the sale of this button to the minor was intentional. The trial court could further conclude that the seller of this type of button should have realized that it would tend to be harmful to the morals of the purchaser or others. R. S. A. 169:32 (Supp. 1972). This would warrant a finding and ruling that the defendant wilfully contributed to the delinquency of this minor as charged in the complaint. [Citations omitted.]" *Id.*, at 242, 306 A. 2d, at 784.

The Court simply casts aside this authoritative construction of New Hampshire law, seizes one phrase out

of context, and concludes that there was no evidence to establish that the appellant "[knew] the girl to be a minor, personally sold her the button, or personally caused another to sell it to her." The word "personally" is the contribution of this Court to the New Hampshire statute; it is not contained in the statute, and is not once used by the Supreme Court of New Hampshire in its opinion dealing with the facts of this very case. Indeed, the entire thrust of the opinion of the Supreme Court of New Hampshire is that appellant need not *personally* have sold the button to the minor nor *personally* have authorized its sale to a minor in order to be guilty of the statutory offense. The only fair reading of the above-quoted language from the Supreme Court of New Hampshire is that the word "wilfully" in the statute does *not* mean *"personally,"* and the facts that the appellant controlled and operated the shop, that the same type of pin had been previously purchased at the shop, and that the pins were prominently offered for sale were sufficient evidence on the issue of willfulness.

This may seem to us a somewhat broad construction of the language "wilfully" or "knowingly," though our own cases make it clear that we are dealing with words which may be given a variety of meanings by their context:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and

> purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness." *Spies* v. *United States,* 317 U. S. 492, 497–498 (1943).

But since our authority to review state court convictions is limited to the vindication of claims of federal rights, we must take the meaning of the statute, and of the words "wilfully" and "knowingly" which it uses, as given to us by the Supreme Court of New Hampshire. I would have thought such a proposition well settled by our prior decisions:

> "We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." *Garner* v. *Louisiana,* 368 U. S. 157, 166 (1961).

We do have constitutional authority in appropriate cases to hold that the State's construction of its statute is such that the statutory language did not give a criminal defendant fair warning of the conduct which is construed to be embraced within it. *Cole* v. *Arkansas,* 333 U. S. 196 (1948); *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964). But this is a far cry from our own rewriting of a state statute in order to make it require a highly specific intent, and then turning around and saying that there was no evidence before the state courts to prove the kind of intent which we have said the statute requires. I would at least note probable jurisdiction over the appeal and set the case for oral argument. Since the Court instead chooses, without ever having heard argument, to rewrite the New Hampshire statute and substitute its interpretation for that of the Supreme Court of New Hampshire, I dissent.

O'SHEA, MAGISTRATE, CIRCUIT COURT OF ALEXANDER COUNTY, ILLINOIS, ET AL. *v.* LITTLETON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-953. Argued October 17, 1973—Decided January 15, 1974

Respondents, 17 black and two white residents of Cairo, Illinois, brought a civil rights class action against petitioners, a magistrate and a circuit court judge, who allegedly engaged under color of state law, in a continuing pattern and practice of conduct consisting of illegal bond-setting, sentencing, and jury-fee practices in criminal cases, which assertedly deprived respondents and members of their class of their rights under the Constitution and 42 U. S. C. §§ 1981–1983, 1985. The District Court dismissed the action for want of jurisdiction to issue the injunctive relief sought and on the ground of judicial immunity. The Court of Appeals reversed, holding that issuance of injunctions against judicial officers was not forbidden if their conduct was intentionally racially discriminatory against a cognizable class of persons. Absent sufficient remedy at law, it was held that if respondents proved their allegations, the District Court should fashion appropriate relief to enjoin petitioners from depriving others of their constitutional rights while carrying out their judicial duties in the future. *Held:*

1. The complaint fails to satisfy the threshold requirement of Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy, where none of the named plaintiffs is identified as himself having suffered any injury in the manner specified, the claim alleging injury is in only the most general terms, and there are no allegations that any relevant state criminal statute is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law. Pp. 493–499.

(a) If none of the named plaintiffs purporting to represent a class meets the case-or-controversy requirement, none may seek relief on behalf of himself or any other member of the class. Pp. 494–495.

(b) That requirement is not satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. P. 497.

(c) Where it can only be speculated whether respondents will be arrested for violating an ordinance or state statute, particularly in the absence of allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct, and respondents have not pointed to any imminent prosecutions contemplated against them so that they do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court. Pp. 497–498.

2. Even if the complaint were considered to present an existing case or controversy, no adequate basis for equitable relief has been stated. Pp. 499–504.

(a) The injunctive relief sought by respondents would constitute a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings, and would sharply conflict with recognized principles of equitable restraint, *Younger* v. *Harris,* 401 U. S. 37. Pp. 499–502.

(b) Respondents also failed to establish the basic requisites of the issuance of equitable relief—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law—in view of the conjectural nature of the threatened injury to which respondents are allegedly subjected, and where there are available other procedures, both state and federal, which could provide relief. Pp. 502–504.

468 F. 2d 389, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment and in Part I of the Court's opinion, *post,* p. 504. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 505.

Robert J. O'Rourke, Deputy Assistant Attorney General of Illinois, argued the cause for petitioners. With

him on the briefs were *William J. Scott*, Attorney General, *Fred F. Herzog*, First Assistant Attorney General, *John W. Freels*, Special Assistant Attorney General, and *Jerrald B. Abrams*, Assistant Attorney General.

Alan M. Wiseman argued the cause for respondents. With him on the brief were *James B. O'Shaughnessy* and *Michael P. Seng.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The respondents are 19 named individuals who commenced this civil rights action, individually and on behalf of a class of citizens of the city of Cairo, Illinois, against the State's Attorney for Alexander County, Illinois, his investigator, the Police Commissioner of Cairo, and the petitioners here, Michael O'Shea and Dorothy Spomer, Magistrate and Associate Judge of the Alexander County Circuit Court, respectively, alleging that they have intentionally engaged in, and are continuing to engage in, various patterns and practices of conduct in the administration of the criminal justice system in Alexander County that deprive respondents of rights secured by the First, Sixth, Eighth, Thirteenth, and Fourteenth Amendments, and by 42 U. S. C. §§ 1981, 1982, 1983, and 1985. The complaint, as amended, alleges that since the early 1960's, black citizens of Cairo, together with a small number of white persons on their behalf, have been actively, peaceably and lawfully seeking equality of opportunity and treatment in employment, housing, education, participation

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien*, Assistant Attorneys General, and *Robert R. Granucci*, Deputy Attorney General, for the State of California; and by *Jack E. Horsley* and *Richard F. Record, Jr.*, for the Illinois State Bar Assn.

in governmental decisionmaking and in ordinary day-to-day relations with white citizens and officials of Cairo, and have, as an important part of their protest, participated in, and encouraged others to participate in, an economic boycott of city merchants who respondents consider have engaged in racial discrimination. Allegedly, there had resulted a great deal of tension and antagonism among the white citizens and officials of Cairo.

The individual respondents are 17 black and two white residents of Cairo. The class, or classes, which they purport to represent are alleged to include "all those who, on account of their race or creed and because of their exercise of First Amendment rights, have [been] in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County," as well as financially poor persons "who, on account of their poverty, are unable to afford bail, or are unable to afford counsel and jury trials in city ordinance violation cases." The complaint charges the State's Attorney, his investigator, and the Police Commissioner with a pattern and practice of intentional racial discrimination in the performance of their duties, by which the state criminal laws and procedures are deliberately applied more harshly to black residents of Cairo and inadequately applied to white persons who victimize blacks, to deter respondents from engaging in their lawful attempt to achieve equality. Specific supporting examples of such conduct involving some of the individual respondents are detailed in the complaint as to the State's Attorney and his investigator.

With respect to the petitioners, the county magistrate and judge, a continuing pattern and practice of conduct, under color of law, is alleged to have denied and to continue to deny the constitutional rights of respondents and members of their class in three respects:

(1) petitioners set bond in criminal cases according to an unofficial bond schedule without regard to the facts of a case or circumstances of an individual defendant in violation of the Eighth and Fourteenth Amendments; (2) "on information and belief" they set sentences higher and impose harsher conditions for respondents and members of their class than for white persons, and (3) they require respondents and members of their class when charged with violations of city ordinances which carry fines and possible jail penalties if the fine cannot be paid, to pay for a trial by jury in violation of the Sixth, Eighth, and Fourteenth Amendments. Each of these continuing practices is alleged to have been carried out intentionally to deprive respondents and their class of the protections of the county criminal justice system and to deter them from engaging in their boycott and similar activities. The complaint further alleges that there is no adequate remedy at law and requests that the practices be enjoined. No damages were sought against the petitioners in this case, nor were any specific instances involving the individually named respondents set forth in the claim against these judicial officers.

The District Court dismissed the case for want of jurisdiction to issue the injunctive relief prayed for and on the ground that petitioners were immune from suit with respect to acts done in the course of their judicial duties. The Court of Appeals reversed, holding that *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), on which the District Court relied, did not forbid the issuance of injunctions against judicial officers if it is alleged and proved that they have knowingly engaged in conduct intended to discriminate against a cognizable class of persons on the basis of race. Absent sufficient remedy at law, the Court of Appeals ruled that in the event respondents proved their allegations, the District Court should proceed to fashion appropriate injunctive relief

to prevent petitioners from depriving others of their constitutional rights in the course of carrying out their judicial duties in the future.[1] We granted certiorari. 411 U. S. 915 (1973).

I

We reverse the judgment of the Court of Appeals. The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. *Flast* v. *Cohen*, 392 U. S. 83, 94–101 (1968); *Jenkins* v. *McKeithen*, 395 U. S. 411, 421–425 (1969) (opinion of MARSHALL, J.). Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).[2] There

[1] While the Court of Appeals did not attempt to specify exactly what type of injunctive relief might be justified, it at least suggested that it might include a requirement of "periodic reports of various types of aggregate data on actions on bail and sentencing." 468 F. 2d, at 415. The dissenting judge urged that a federal district court has no power to supervise and regulate by mandatory injunction the discretion which state court judges may exercise within the limits of the powers vested in them by law, and that any relief contemplated by the majority holding which might be applicable to the pattern and practice alleged, if proven, would subject the petitioners to the continuing supervision of the District Court, the necessity of defending their motivations in each instance when the fixing of bail or sentence was challenged by a Negro defendant as inconsistent with the equitable relief granted, and the possibility of a contempt citation for failure to comply with the relief awarded. *Id.*, at 415–417.

[2] We have previously noted that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e. g.*, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 212 (1972) (WHITE, J., concurring); *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 6 (1968)." *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617

must be a "personal stake in the outcome" such as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91 (1947). Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.[3] *Bailey* v. *Patterson*, 369 U. S. 31, 32–33

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n. 3 (1973). But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur. Title 42 U. S. C. § 1983, in particular, provides for liability to the "party injured" in an action at law, suit in equity, or other proper proceeding for redress. Perforce, the constitutional requirement of an actual case or controversy remains. Respondents still must show actual or threatened injury of some kind to establish standing in the constitutional sense.

[3] There was no class determination in this case as the complaint was dismissed on grounds which did not require that determination to be made. Petitioners assert that the lack of standing of the named respondents to raise the class claim is buttressed by the incongruous nature of the class respondents seek to represent. The class is variously and incompatibly defined in the complaint as those residents of Cairo, both Negro and white, who have boycotted

(1962); *Indiana Employment Division* v. *Burney*, 409 U. S. 540 (1973). See 3B J. Moore, Federal Practice, ¶ 23.10–1, n. 8 (2d ed. 1971).

In the complaint that began this action, the sole allegations of injury are that petitioners "have engaged in and continue to engage in, a pattern and practice of conduct . . . all of which has deprived and continues to deprive plaintiffs and members of their class of their" constitutional rights and, again, that petitioners "have denied and continue to deny to plaintiffs and members of their class their constitutional rights" by illegal bond-setting, sentencing, and jury-fee practices. None of the named plaintiffs is identified as himself having suffered any injury in the manner specified. In sharp contrast to the claim for relief against the State's Attorney where specific instances of misconduct with respect to particular individuals are alleged, the claim against petitioners alleges injury in only the most general terms. At oral argument, respondents' counsel stated that some of the named plaintiffs-respondents, who could be identified by name if necessary, had actually been defendants in proceedings before petitioners and had suffered from the alleged unconstitutional practices.[4] Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if

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certain businesses in that city and engaged in similar activities for the purpose of combatting racial discrimination, as a class of all Negro citizens suffering racial discrimination in the application of the criminal justice system in Alexander County (though two white persons are named respondents), and as all poor persons unable to afford bail, counsel, or jury trials in city ordinance cases. The absence of specific claims of injury as a result of any of the wrongful practices charged, in light of the ambiguous and contradictory class definition proffered, bolsters our conclusion that these respondents cannot invoke federal jurisdiction to hear the claims they present in support of their request for injunctive relief.

[4] Tr. of Oral Arg. 21, 23, 26.

unaccompanied by any continuing, present adverse effects. Neither the complaint nor respondents' counsel suggested that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners. Indeed, if any of the respondents were then serving an assertedly unlawful sentence, the complaint would inappropriately be seeking relief from or modification of current, existing custody. See *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). Furthermore, if any were then on trial or awaiting trial in state proceedings, the complaint would be seeking injunctive relief that a federal court should not provide. *Younger* v. *Harris*, 401 U. S. 37 (1971); see also Part II, *infra*. We thus do not strain to read inappropriate meaning into the conclusory allegations of this complaint.

Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners. Important to this assessment is the absence of allegations that any relevant criminal statute of the State of Illinois is unconstitutional on its face or as applied or that respondents have been or will be improperly charged with violating criminal law. If the statutes that might possibly be enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the

allegedly illegal conduct charged. Apparently, the proposition is that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture. See *Younger* v. *Harris, supra,* at 41–42. The nature of respondents' activities is not described in detail and no specific threats are alleged to have been made against them. Accepting that they are deeply involved in a program to eliminate racial discrimination in Cairo and that tensions are high, we are nonetheless unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners.

As in *Golden* v. *Zwickler,* we doubt that there is " 'sufficient immediacy and reality' " to respondents' allegations of future injury to warrant invocation of the jurisdiction of the District Court. There, "it was wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint." 394 U. S., at 109. Here we can only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct. Cf. *Perez* v. *Ledesma,* 401 U. S. 82, 101–102

(1971) (opinion of BRENNAN, J.). Even though Zwickler attacked a specific statute under which he had previously been prosecuted, the threat of a new prosecution was not sufficiently imminent to satisfy the jurisdictional requirements of the federal courts. Similarly, respondents here have not pointed to any imminent prosecutions contemplated against any of their number and they naturally do not suggest that any one of them expects to violate valid criminal laws. Yet their vulnerability to the alleged threatened injury from which relief is sought is necessarily contingent upon the bringing of prosecutions against one or more of them. Under these circumstances, where respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court.

In *Boyle* v. *Landry*, 401 U. S. 77, 81 (1971), the Court ordered a complaint dismissed for insufficiency of its allegations where there was no basis for inferring "that any one or more of the citizens who brought this suit is in any jeopardy of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner." The Court expressed the view that "the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Ibid.* A similar element of uncertainty about whether the alleged injury will be likely to occur is present in this case, and a similar reluctance to interfere with the normal operation of state administration of its criminal laws in the manner sought by respondents strengthens the conclusion

that the allegations in this complaint are too insubstantial to warrant federal adjudication of the merits of respondents' claim.

II

The foregoing considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief; and even if we were inclined to consider the complaint as presenting an existing case or controversy, we would firmly disagree with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated. The Court has recently reaffirmed the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger* v. *Harris,* 401 U. S. 37, 43–44 (1971). Additionally, recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is " 'both great and immediate.' " *Id.,* at 46. See, *e.g., Fenner* v. *Boykin,* 271 U. S. 240 (1926); *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943). In holding that 42 U. S. C. § 1983 is an Act of Congress that falls within the "expressly authorized" exception to the absolute bar against federal injunctions directed at state court proceedings provided by 28 U. S. C. § 2283, the Court expressly observed that it did not intend to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster,* 407 U. S. 225, 243 (1972). Those principles preclude equitable intervention in the circumstances present here.

Respondents do not seek to strike down a single state statute, either on its face or as applied; nor do they seek to enjoin any criminal prosecutions that might be brought under a challenged criminal law. In fact, respondents apparently contemplate that prosecutions will be brought under seemingly valid state laws. What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. The order the Court of Appeals thought should be available if respondents proved their allegations would be operative only where permissible state prosecutions are pending against one or more of the beneficiaries of the injunction. Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris, supra,* and related cases sought to prevent.

A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable. In concluding that injunctive relief would be available in this case because it would not interfere with prosecutions to be commenced under challenged statutes, the Court of Appeals misconceived the underlying basis for withholding federal equitable relief when the normal course of criminal proceedings in the state courts would otherwise be disrupted. The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts; the object is to sustain "[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli* v. *Minard,* 342 U. S. 117,

120 (1951).[5] See also *Cleary* v. *Bolger*, 371 U. S. 392 (1963); *Wilson* v. *Schnettler*, 365 U. S. 381 (1961); *Pugach* v. *Dollinger*, 365 U. S. 458 (1961); cf. *Rea* v. *United States*, 350 U. S. 214 (1956). An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*. Moreover, it would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners in the course of future criminal trial proceedings involving any of the members of the respondents' broadly defined class.[6] The Court of Appeals disclaimed any intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the "periodic reporting" system it thought might be warranted [7] would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity. Cf. *Greenwood* v. *Peacock*, 384 U. S. 808 (1966). Moreover, because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance, the question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed. Presumably, any member of respondents' class who appeared as an

[5] It was noted in *Stefanelli* that in suits brought under 42 U. S. C. § 1983 "we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages. Compare *Giles* v. *Harris*, 189 U. S. 475, with *Lane* v. *Wilson*, 307 U. S. 268." 342 U. S., at 122.

[6] See n. 3, *supra*.

[7] See n. 1, *supra*.

accused before petitioners could allege and have adjudicated a claim that petitioners were in contempt of the federal court's injunction order, with review of adverse decisions in the Court of Appeals and, perhaps, in this Court. Apart from the inherent difficulties in defining the proper standards against which such claims might be measured, and the significant problems of proving noncompliance in individual cases, such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted.

Respondents have failed, moreover, to establish the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. We have already canvassed the necessarily conjectural nature of the threatened injury to which respondents are allegedly subjected. And if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged. Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., c. 38, §§ 114–5, 114–6 (1971), review on direct appeal or on postconviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including the possibility of suspension or removal, are warranted. Ill. Const., Art. VI, § 15 (e). In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available.

Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights, as this complaint alleges, must take account of 18 U. S. C. § 242. See *Greenwood* v. *Peacock, supra,* at 830; *United States* v. *Price,* 383 U. S. 787, 793–794 (1966); *United States* v. *Guest,* 383 U. S. 745, 753–754 (1966); *Screws* v. *United States,* 325 U. S. 91, 101–106 (1945); *United States* v. *Classic,* 313 U. S. 299 (1941). Cf. *Monroe* v. *Pape,* 365 U. S. 167, 187 (1961). That section provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined . . . or imprisoned . . . ."

Whatever may be the case with respect to civil liability generally, see *Pierson* v. *Ray,* 386 U. S. 547 (1967), or civil liability for willful corruption, see *Alzua* v. *Johnson,* 231 U. S. 106, 110–111 (1913); *Bradley* v. *Fisher,* 13 Wall. 335, 347, 350, 354 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia,* 100 U. S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress . . . ." *Gravel* v. *United States,* 408 U. S. 606, 627 (1972).

Considering the availability of other avenues of relief open to respondents for the serious conduct they assert, and the abrasive and unmanageable intercession which the injunctive relief they seek would represent, we conclude that, apart from the absence of an existing case or controversy presented by respondents for adjudication, the Court of Appeals erred in deciding that the District Court should entertain respondents' claim.

Reversed.

MR. JUSTICE BLACKMUN, concurring in part.

I join the judgment of the Court and Part I of the Court's opinion which holds that the complaint "failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." *Ante*, at 493.

When we arrive at that conclusion, it follows, it seems to me, that we are precluded from considering any other issue presented for review. Thus, the Court's additional discussion of the question whether a case for equitable relief was stated amounts to an advisory opinion that we are powerless to render. *Hayburn's Case*, 2 Dall. 409 (1792); *United States* v. *Evans*, 213 U. S. 297, 301 (1909); *Muskrat* v. *United States*, 219 U. S. 346, 360–361 (1911); *Stearns* v. *Wood*, 236 U. S. 75 (1915); *Coffman* v. *Breeze Corps.*, 323 U. S. 316 (1945); *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947); *Paschall* v. *Christie-Stewart, Inc.*, *ante*, at 101–102.

Mr. Justice Frankfurter stated the applicable principle in speaking for the Court in *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U. S. 222, 223 (1954):

> "On this appeal, appellee contends that the District Court should not have reached the statutory and constitutional questions—that it should have

> dismissed the suit for want of a 'case or controversy,' for lack of standing on the union's part to bring this action, ... Since the first objection is conclusive, there is an end of the matter."

I would adhere to that principle. Either there is no case or controversy and that is the end of the matter, or there is a case or controversy and the Court may go on to a decision on the merits. In my view, the Court may not have it both ways.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The respondents in this case are black and indigent citizens of Cairo, Illinois. Suing in federal court, they alleged that since the early 1960's black citizens of Cairo have been actively seeking equal opportunity and treatment in employment, housing, education, and ordinary day-to-day relations with the white citizens and officials of Cairo. In this quest, blacks have engaged in a boycott of local merchants deemed to have engaged in racial discrimination.

Alleging that this quest for equality has generated substantial antagonism from white governmental officials, respondents brought a class action under 42 U. S. C. §§ 1981, 1982, 1983, and 1985, seeking to represent citizens of Cairo who have been subjected in the past, and continue to be subjected, to the allegedly discriminatory and unconstitutional administration of criminal justice in Alexander County, Illinois, which includes Cairo. Among their other claims, respondents alleged that petitioners Michael O'Shea and Dorothy Spomer, both now judges in Alexander County,[1] engage in acts which deprive them and

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[1] O'Shea, Magistrate of Alexander County Circuit Court when this suit was instituted, became an Associate Judge in the county on July 1, 1971.

members of their class of their constitutional rights. These judges allegedly set bond in criminal cases without regard to the facts of individual cases and as punishment, and not merely to assure the appearance of defendants at trial; impose higher sentences and harsher conditions of sentencing on black than on white citizens; and require respondents and members of their class, when charged with violations of city ordinances which carry fines and possible jail penalties, to pay for a trial by jury if the fine cannot be paid.

I

An injunction was sought against this conduct. The District Court referred obliquely to want of jurisdiction, but, focusing on the fact that the complaint sought review of matters of judicial discretion, concluded that the action should be dismissed because judges and magistrates are immune from liability for acts done in performance of their duties. In reversing and remanding the case to the District Court, the Court of Appeals held that the action was not barred by the doctrine of judicial immunity. The Court of Appeals also held that the complaint contained sufficiently specific factual averments to satisfy Fed. Rule Civ. Proc. 8 (a). 468 F. 2d 389.

This Court now decides for the first time in the course of this litigation that the complaint is deficient because it does not state a "case or controversy" within the meaning of Art. III.

The fact that no party has raised that issue in this closely contested case is no barrier, of course, to our consideration of it. But the reasoning and result reached by the Court are to say the least a *tour de force* and quite inconsistent with the allegations in the complaint, which are within constitutional requirements.

We know from the record and oral argument that Cairo, Illinois, is boiling with racial conflicts. This class action brought under 42 U. S. C. §§ 1981, 1982, 1983, and 1985 is to remedy vast invasions of civil rights. The Court, however, says that it is not a "case or controversy" because none of the named plaintiffs has alleged infringement of his rights and the fact that other members of the class may have been injured is not enough. As to the latter, *Bailey* v. *Patterson,* 369 U. S. 31, 32–33, is cited in support. But in *Bailey* the named persons were given standing to sue, the statement that "[t]hey cannot represent a class of whom they are not a part," *id.,* at 32–33, being dictum and its only authority being *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 162–163, which was not a class action. Nor was the question on which the case is made to turn resolved in *Indiana Employment Division* v. *Burney,* 409 U. S. 540. For we only held that where the named plaintiff had received relief and nothing appeared as to the relief, if any, granted to members of the class, the possible question of mootness should be resolved by the District Court. Even so, there were dissents. The upshot is that one crucial issue on which the Court makes this case turn has not been decided by the Court and was never argued here. At the very least we should have a full-dress argument on that point.

But I do not press the point, for the amended complaint is sufficiently specific to warrant a trial.

As respects O'Shea, the Magistrate, and Spomer, the Circuit Judge, the charges concerning *named plaintiffs* are as follows:

(1) that excessive bonds have been required in violation of the Eighth and Fourteenth Amendments because petitioners follow an unofficial bond schedule without regard to the facts of individual cases;

(2) on information and belief, that petitioners set higher sentences and impose harsher conditions for respondents and members of their class than for white persons;

(3) that, where the named plaintiffs have been fined and at times sentenced to jail and cannot pay the fines, these judges have required them to pay for a trial by jury.

Moreover, the amended complaint alleges that O'Shea and Spomer "continue to engage in a pattern and practice" which "has deprived and continues to deprive" the named plaintiffs and members of their class of their constitutional rights. Moreover, it is alleged that since early in the 1960's the blacks of Cairo and some whites have been actively and peaceably seeking to end discrimination in Cairo and that those activities have generated and continue to generate tension and antagonism in Cairo.

It is also alleged that the police commissioner in Cairo "has denied and continues to deny to plaintiffs and members of their class their constitutional rights in the following ways:

> "(a) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where such charges are not warranted and are merely for the purpose of harassment and to discourage and prevent plaintiffs and their class from exercising their constitutional rights.
>
> "(b) Defendant has made or caused to be made or cooperated in the making of arrests and the filing of charges against plaintiffs and members of their class where there may be some colorable basis to the arrest or charge, but the crime defined in the charge is much harsher than is warranted by the

> facts and is far more severe than like charges would be against a white person."

These allegations support the likelihood that the named plaintiffs as well as members of their class will be arrested in the future and therefore will be brought before O'Shea and Spomer and be subjected to the alleged discriminatory practices in the administration of justice.

These allegations of past and continuing wrongdoings clearly state a case or controversy in the Art. III sense. They are as specific as those alleged in *Jenkins* v. *McKeithen*, 395 U. S. 411, and in *Doe* v. *Bolton*, 410 U. S. 179, where we held that cases or controversies were presented.

Specificity of proof may not be forthcoming; but specificity of charges is clear.

What has been alleged here is not only wrongs done to named plaintiffs, but a recurring pattern of wrongs which establishes, if proved, that the legal regime under control of the whites in Cairo, Illinois, is used over and over again to keep the blacks from exercising First Amendment rights, to discriminate against them, to keep from the blacks the protection of the law in their lawful activities, to weight the scales of justice repeatedly on the side of white prejudices and against black protests, fears, and suffering. This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen. It may not survive a trial. But if this case does not present a "case or controversy" involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable. This will please the white superstructure, but it does violence to the conception of evenhanded justice envisioned by the Constitution.

Suits under 42 U. S. C. § 1983 are exceptions to the absolute bar against federal injunctions directed at state

court proceedings provided in 28 U. S. C. § 2283.[2] See *Mitchum* v. *Foster*, 407 U. S. 225. It will be much more appropriate to pass on the nature of any equitable relief to be granted after the case has been tried. It may be that when the case is ended, no injunction against any state proceeding will be asked for or will seem appropriate. Or the injunctive relief in final analysis may come down to very narrow and discrete orders prohibiting precise practices. The Court labels this an "ongoing federal audit of state criminal proceedings." That of course is a regime that we do not foster. But the Federal Constitution is supreme and if the power of the white power-structure in Cairo, Illinois, is so great as to disregard it, extraordinary relief is demanded. I would cross the bridge of remedies only when the precise contours of the problem have been established after a trial.

To repeat, in the instant case, there are allegations that state lower-court judges are willfully discriminating in their sentencing determinations and are imposing excessive bail. The effects of such results may well persist quite aside from the disposition of the underlying substantive charges at trial or on appeal, and may well be functionally unreviewable. The Court of Appeals observed, 468 F. 2d, at 408, that the individual defendant in a criminal case will find it difficult, if not impossible, to obtain review of a sentence within statutory limits unless it is manifestly harsh or unjustified, citing the Illinois rule that "imposition of sentence is a matter of judicial discretion, and in the absence of a manifest abuse of that discretion it will not be altered

[2] Title 28 U. S. C. § 2283 provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

by a reviewing court." *People* v. *Bonner*, 37 Ill. 2d 553, 563, 229 N. E. 2d 527, 533 (1967), cert. denied, 392 U. S. 910 (1968).

Furthermore, the respondents do not primarily allege individual instances of excessively harsh treatment, on an absolute scale, of black and indigent defendants, but rather a pattern of discriminatory treatment, especially in favor of prosperous white defendants. Such allegations would amount to denials of equal protection even if blacks and poor whites were not subject to sentences which were so excessive that they constituted manifest abuses of discretion, as long as wealthy whites were at the same time receiving relatively lenient sentences from the same judges. A single instance of sentencing by itself might not strike the conscience of a reviewing court, but when coupled with a pattern of discriminatory treatment could well justify the equitable intervention of a federal court. A class suit where evidence could be developed showing a pattern of discriminatory bail and sentencing decisions by the petitioners would be the one appropriate vehicle in which these claims could be developed.

Whether respondents could come forward with such evidence, and whether the Federal District Court in the exercise of its equitable discretion could frame suitable relief are, of course, questions which can be answered only after a trial on the merits. The resolution of those issues would then be properly reviewable. But the principles of abstention and comity should not bar this suit *ab initio*.

II

Because I believe that the complaint is sufficient to state an actual "case or controversy," I would reach the further question, on the merits, whether equitable relief may be warranted in the circumstances of this case. I agree, nonetheless, with my Brother BLACKMUN that the

Court's discussion in Part II of its opinion, whether a case for equitable relief was stated, is an advisory opinion since the Court has determined that there is no "case or controversy" in the Article III sense.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

There are seven statutes in addition to 42 U. S. C. § 1983 which the Court has recognized constitute "express exceptions" to the policy of nonintervention in state proceedings enunciated by the anti-injunction statute: (1) The Bankruptcy Act, 11 U. S. C. § 1 *et seq.*, specifically recognized by Congress as an exception to 28 U. S. C. § 2283. See *Mitchum* v. *Foster*, 407 U. S. 225, 233. (2) The Interpleader Act of 1936, 28 U. S. C. § 2361, allowing federal courts to restrain prosecution of state court suits involving property involved in federal interpleader actions. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74. (3) The 1851 Act limiting the liability of shipowners by providing for the cessation of proceedings against them when they have made a deposit equal to the value of their ships with a federal court, 46 U. S. C. § 185. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–600. (4) The Frazier-Lemke Farm Mortgage Act, 11 U. S. C. § 203 (s)(2) (1958 ed.). See *Kalb* v. *Feuerstein*, 308 U. S. 433. (5) The Federal Habeas Corpus Act, 28 U. S. C. § 2251, permitting a stay of state court proceedings when a federal habeas action is pending. See *Ex Parte Royall*, 117 U. S. 241, 248–249. (6) Section 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 33. See *Porter* v. *Dicken*, 328 U. S. 252, 255. (7) Legislation providing for the removal of litigation to federal courts and the simultaneous cessation of state court proceedings, 28 U. S. C. § 1446 (e). See *French* v. *Hay*, 22 Wall. 250.

This Court has also recognized the power of a federal court to stay proceedings in a state court to prevent relitigation of an issue already decided in a federal proceeding. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112. It has recognized the power of a federal court to enjoin state court proceedings to protect the jurisdiction which a federal court has already acquired over a *res*. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135–136. And we have found it proper for a federal court to directly enjoin state proceedings when the injunction was sought by either the United States, *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, or by a federal agency asserting superior federal interests, see *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138.

SPOMER, STATE'S ATTORNEY OF ALEXANDER COUNTY, ILLINOIS *v.* LITTLETON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72-955. Argued October 17, 1973—Decided January 15, 1974

Respondents, 17 black and two white residents of Cairo, Illinois, brought a civil rights class action against the then State's Attorney of Alexander County, Illinois, individually and in his official capacity, charging him with certain purposeful racial discrimination practices, under color of state law, in violation of the Constitution and 42 U. S. C. §§ 1981–1983, 1985. The District Court dismissed the complaint for want of jurisdiction to grant injunctive relief. The Court of Appeals reversed, holding that a prosecutor's quasi-judicial immunity from injunctive proscription was not absolute, and that since respondents' remedies at law were inadequate, an injunctive remedy might be available if respondents could prove their claims. Subsequent to the Court of Appeals' decision, petitioner was elected as successor State's Attorney, and in the petition for certiorari filed with this Court was substituted as a party. *Held:* Where, on the record, respondents have never charged petitioner with anything and do not presently seek to enjoin him from doing anything, so that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro,* the case is vacated and remanded to the Court of Appeals for a determination, in the first instance, of whether the former dispute is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against petitioner. Pp. 520–523.

468 F. 2d 389, vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

James B. Zagel argued the cause for petitioner. With him on the brief was *Patrick F. Healy.*

Alan M. Wiseman argued the cause for respond-

ents. With him on the brief were *James B. O'Shaughnessy* and *Michael P. Seng.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This is a companion case to *O'Shea* v. *Littleton, ante,* p. 488, involving claims which the respondents, 17 black and two white residents of Cairo, Illinois, individually and as representatives of the class they purport to represent, set forth in that portion of their amended civil rights complaint which alleged wrongful conduct on the part of Peyton Berbling, individually and in his capacity as State's Attorney for Alexander County, Illinois, the county in which the city of Cairo is located. As discussed in *O'Shea,* the complaint alleged a broad range of racially discriminatory patterns and practices in the administration of the criminal justice system in Alexander County by the Police Commissioner of Cairo, Magistrate Michael O'Shea and Associate Judge Dorothy Spomer of the Alexander County Circuit Court, State's Attorney Berbling, and Earl Shepherd, an investigator for Berbling. Allegedly, a decade of active, but lawful, efforts to achieve racial equality for the black residents of Cairo had resulted in continuing intentional conduct on the part of those named as defendants in the complaint to deprive the plaintiff-respondents of the even-handed protection of the criminal laws, in violation of various amendments to the Constitution and 42 U. S. C. §§ 1981, 1982, 1983, and 1985.

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*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien,* Assistant Attorneys General, and *Robert R. Granucci,* Deputy Attorney General, for the State of California; and by *Joseph P. Busch* for the District Attorney of Los Angeles County.

In particular, the complaint charged State's Attorney Berbling with purposeful racial discrimination, under color of state law, by neglecting to provide for respondents' safety though knowing of the possibility of racial disorders, by refusing to prosecute persons who threaten respondents' safety and property, and by refusing to permit respondents to give evidence against white persons who threaten them. It was alleged, with particular incidents recounted as to some charges, that "Berbling has denied and continues to deny" the constitutional rights of respondents and members of their class by following the practices of (a) refusing to initiate criminal proceedings and to hear criminal charges against white persons upon complaint by members of respondents' class,[1]

[1] Specific examples of Berbling's practice were alleged as follows:

"(1) On March 28, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan, a white man, who pointed a gun at him as he (Wilson) attempted to move into the house next door to Charlie Sullivan on 22nd Street, in Cairo, Illinois. Sullivan threatened Wilson with the gun and told him to move the truck containing household furnishings and leave the area, thereby attempting to prevent James Wilson from holding property.

"(2) On or about March 29, 1969, defendant refused to permit James Wilson to file criminal charges against Charlie Sullivan who fired shots from a gun around James Wilson's home to intimidate his family in order to prevent James Wilson from holding property.

"(3) In January, 1970, defendant refused to permit Robert Martin to file charges against Charlie Sullivan, who tried to run him down in a truck while peacefully marching in exercise of his First Amendment rights.

"(4) In June, 1970, defendant refused to permit Ezell Littleton to file charges against a white man who without cause or justification assaulted and battered him.

"(5) In June, 1970, defendant refused to permit Rev. Manker Harris to file charges against two white policemen of the City of Cairo for attempted murder and/or malicious prosecution.

"(6) On August 10, 1970, defendant Berbling, through a subordinate, defendant Earl Shepherd, refused to permit plaintiff Hazel

(b) submitting misdemeanor complaints which have been filed by black persons against whites to a grand jury, rather than proceeding by information or complaint, and then either interrogating witnesses and complainants before the grand jury with purposeful intent to racially discriminate,[2] or failing to interrogate them at all,[3] (c) in-

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James to file criminal charges against Raymond Hurst, a white man, who had kicked plaintiff James in the stomach while she was peacefully demonstrating against the racially discriminatory practices of merchants and of public officials of the City of Cairo.

"(7) In May, 1969, Plaintiff Ewing and eight others could have [brought] and desired to bring criminal charges against a white man who threatened them with a shotgun, but did not because they knew of defendant's practice of refusing to take complaints and were discouraged from making useless gestures."

[2] Cited in support of this allegation was an incident when "Morris Garrett (a 13 year old boy), on August 8, 1970, during a demonstration against the racially discriminatory practices of merchants and public officials of the City of Cairo, was struck by one Tom Madra. A complaint was filed which was presented to the grand jury. Morris Garrett appeared before the grand jury. Defendant Berbling, rather than question him regarding the incident, asked him such questions as 'did you get paid for picketing?' A no-true bill was returned by the grand jury."

[3] Two episodes of this type were described:

"(1) On August 13, 1970, Cheryl Garrett and Yvonda Taylor, ages 18 and 16 respectively, were shot at by one Jack Guetterman, Jr. Rev. Walter Garrett and Ezell Littleton, following a telephone call from the young girls, went to the scene of the shooting. Shortly thereafter police officers arrived. While Rev. Walter Garrett was discussing the situation with one police officer, one Jack Guetterman, Sr. struck Rev. Garrett in the face, causing him to fall to the ground. A complaint was filed by Rev. Walter Garrett respecting this incident. Defendant Berbling presented the complaint to the grand jury, but Rev. Garrett was not interrogated at all respecting the incident. Ezell Littleton, who witnessed the assault, was not called to testify.

"(2) On or about August 8, 1970, Curtis Johnson was struck by one Al Moss while demonstrating against the racially discrimina-

adequately prosecuting the few criminal proceedings instituted against whites at respondents' behest in order to lose the cases or settle them on terms more favorable than those brought against blacks, (d) recommending substantially greater bonds and sentences in cases involving respondents and members of their class than for cases involving whites, (e) charging respondents and members of their class with significantly more serious charges for conduct which would result in no charge or a minor charge against a white person, and (f) depriving respondents of their right to give evidence concerning the security of members of their class.[4] Each of these practices was alleged to be willful, malicious, and carried out with intent to deprive respondents and members of their class of the benefits of the county criminal justice system and to deter them from peacefully boycotting or otherwise engaging in protected First Amendment activity. Since there was asserted to be no adequate remedy at law, respondents requested that Berbling be enjoined from continuing these practices, that he be required to "submit a monthly report to [the District Court] concerning the nature, status and disposition of any complaint brought to him by plaintiffs or members of their class, or by white persons against plaintiffs or members of their class," and that the District Court maintain continuing jurisdiction in this action.[5]

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tory practices of merchants and public officials of the City of Cairo. A complaint was filed, which was presented to the grand jury. Curtis Johnson, however, was not interrogated by defendant Berbling respecting the incident."

[4] Thus, respondents alleged that Berbling sought the "dropping of a criminal charge arising out of a complaint filed by Frank Hollis, a black person, against Tom Madra, a white person, in return for which [Berbling] would drop pending criminal charges against several of the [respondents]."

[5] Damages were also sought against Berbling for these practices and for an alleged conspiracy with his investigator, Shepherd, to

The District Court dismissed that portion of the complaint requesting injunctive relief against Berbling, as well as against Investigator Shepherd, Magistrate O'Shea, and Judge Dorothy Spomer, for want of jurisdiction to grant any such remedy, which was perceived as directed against discretionary acts on the part of these elected state officials. The Court of Appeals reversed, holding that whatever quasi-judicial immunity from injunctive proscription it had previously recognized was appropriate for a prosecutor, was not absolute, and since respondents' alternative remedies at law were thought to be inadequate, an injunctive remedy might be available if respondents could prove their claims of racial discrimination at trial.[6]

The Court of Appeals rendered its decision on October 6, 1972. At the subsequent election in November

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refuse to prosecute those who threatened respondents' safety and to prevent them from giving evidence against whites concerning acts threatening their personal safety. As to the latter, the sixth example in n. 1, *supra,* was reiterated. The Court of Appeals held that "insofar as defendant Berbling was acting within his prosecutorial function he has a quasi-judicial immunity from suit for damages under the Civil Rights Acts," 468 F. 2d 389, 410, and remanded to allow respondents to amend the complaint and to have the District Court determine in the first instance whether some of the acts then alleged would be sufficiently removed from quasi-judicial activity "to warrant removing the cloak of immunity from them." *Id.,* at 410–411. Berbling's petition for certiorari questioning this aspect of the Court of Appeals' ruling was not timely filed in this Court and has been denied. No. 72–1107, *post,* p. 1143. No question concerning damage relief is involved in the case presently before us.

[6] The scope of any injunction which might be found warranted was not finally established or restricted. It was suggested that an initial decree might require "only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of complaints," and confidence was expressed that the District Court would be able to establish further guides as required and, if necessary, to consider individual decisions. 468 F. 2d, at 415.

of that year, petitioner W. C. Spomer [7] was chosen by the voters to succeed Berbling as State's Attorney for Alexander County, and Spomer took office on December 4. In the petition for certiorari filed with this Court on January 3, 1973, seeking review of the Court of Appeals' approval of the possibility of some form of injunctive relief addressed to the State's Attorney in the course of his prosecutorial role, petitioner Spomer relied upon Supreme Court Rule 48 (3), which provides that "[w]hen a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party." Respondents did not oppose the substitution,[8] and we granted certiorari and set the case for argument together with *O'Shea* v. *Littleton, ante,* p. 488. 411 U. S. 915 (1973).

It has become apparent, however, that there is nothing in the record upon which we may firmly base a conclusion that a concrete controversy between W. C. Spomer and the respondents is presented to this Court for resolution. No allegations in the complaint cited any conduct of W. C. Spomer as the basis for equitable or any other relief. Indeed, Spomer is not named as a

[7] State's Attorney W. C. Spomer should not be confused with Judge Dorothy Spomer, a petitioner in *O'Shea* v. *Littleton, ante,* p. 488.

[8] In their brief in opposition to the petition, p. 6, respondents stated that they "seek only equitable relief against petitioner W. C. Spomer. Because the amended complaint asks relief against Berbling in his individual as well as his official capacity, he remains a party in interest in this action." Of course, Spomer, not Berbling, filed for review of the Court of Appeals' decision respecting injunctive relief, and Berbling is not before the Court in this case. Nor did respondents ever seek relief of any kind against Spomer by their complaint.

defendant in the complaint at all, and, of course, he never appeared before either the District Court or the Court of Appeals. The injunctive relief requested against former State's Attorney Berbling, moreover, is based upon an alleged practice of willful and malicious racial discrimination evidenced by enumerated instances in which Berbling favored white persons and disfavored Negroes. The wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney.[9] No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged, apart from the allegation that Berbling, as the incumbent at the time, was then continuing the practices he had previously followed. Cf. *Allen* v. *Regents of the University System of Georgia,* 304 U. S. 439, 444–445 (1938). Nor have respondents ever attempted to substitute Spomer for Berbling after the Court of Appeals decision, so far as the record shows, or made any record allegations that Spomer intends to continue the asserted practices of Berbling of

[9] This Court's Rule 48 (3), governing automatic substitution of successor public officers when the predecessor was a party "in his official capacity," is based upon Fed. Rule Civ. Proc. 25 (d), as amended in 1961. Prior to the 1961 amendment, substitution was not automatic. The history and application of former and present Rule 25 (d) are sketched in 3B J. Moore, Federal Practice ¶ 25.09 [1]–[3] (2d ed. 1969). Of particular relevance is the Advisory Committee Note on the 1961 "automatic substitution" amendment to Rule 25 (d), which suggests that "[i]n general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office." See *id.,* ¶ 25.09 [3], at 25–403, 25–404. The question of whether corrective behavior is thought to be necessary is, of course, dependent on whether the dispute with the predecessor continues with the successor.

which they complain. The plain fact is that, on the record before us, respondents have never charged Spomer with anything and do not presently seek to enjoin him from doing anything.[10] Under these circumstances, recognizing that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, see *Two Guys* v. *McGinley*, 366 U. S. 582, 588 (1961), we remand to the Court of Appeals for a determination, in the first instance, of whether the former dispute regarding the availability of injunctive relief against the State's Attorney is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief

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[10] Despite the statement respondents made in their brief in opposition to the petition for certiorari, n. 8, *supra*, the record does not contain any indication that respondents have ever sought injunctive relief against Spomer in any proceedings in the District Court or the Court of Appeals. Nor would they have had reason to do so in the absence of knowledge that he would succeed Berbling. While Spomer did substitute himself in place of his predecessor, and his counsel made the somewhat extraordinary statement at oral argument that "there is nothing in this record, nor will there be on the part of my client, to indicate that he would change the policies which are alleged to have been exercised by his predecessor," Tr. of Oral Arg. 7, to determine whether respondents have a live controversy with Spomer, we must look to the charges *they* press. Indeed, counsel for respondents observed at oral argument of this case that "in order for us to proceed against Mr. Spomer, it would be necessary for us to investigate the facts to see that the concession apparently made by the State's Attorney is true and amend our complaint." *Id.*, at 19. This merely serves to underscore our concern that we are being asked to render an opinion on the merits of what is now and may continue to be a hypothetical or abstract dispute. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937); *United States* v. *Fruehauf*, 365 U. S. 146, 157 (1961); *North Carolina* v. *Rice*, 404 U. S. 244, 245–246 (1971).

against the petitioner. Cf. *Land* v. *Dollar,* 330 U. S. 731, 739 (1947).

The judgment of the Court of Appeals is vacated and the case is remanded for further consideration and proceedings consistent with this opinion.

It is so ordered.

O'BRIEN ET AL. *v.* SKINNER, SHERIFF, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 72–1058. Argued November 6, 1973—Decided January 16, 1974

Appellants, who are incarcerated in jail as convicted misdemeanants or pretrial detainees unable to make bail but who are under no voting disability under state law, and who requested but were denied the right to register and vote under mobile registration, absentee voting, or other procedures, brought this action challenging the constitutionality of the New York election laws. The contested statutes allow qualified persons to register and vote by absentee measures if precluded from personally doing so because of illness, physical disability, their duties, occupation, or business, and permit absentee voting (but not registration) if the voters are vacationing away from their residence on election day or are confined in a veterans' hospital. The state trial and intermediate appellate courts initially viewed appellants' confinement as physical disability and held that they were entitled to vote by absentee ballot. The New York Court of Appeals reversed that determination, concluding that the disability imposed by incarceration did not come within the terms of the statute. *Held:* The challenged provisions as thus construed, which raise no question of disenfranchisement of persons convicted of criminal conduct and permit incarcerated persons to register and vote by absentee means if confined in a county where they are not residents, violate the Equal Protection Clause of the Fourteenth Amendment, as they arbitrarily discriminate between categories of qualified voters. Pp. 528–531.

31 N. Y. 2d 317, 291 N. E. 2d 134, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. MARSHALL, J., filed a concurring opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 531. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 535.

William D. Eggers argued the cause for appellants. With him on the brief were *David N. Kunkel, Ruth B. Rosenberg, Burt Neuborne,* and *Melvin L. Wulf.*

Michael K. Consedine argued the cause and filed a brief for appellees.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Appeals of New York taken by 72 persons who were at the time of the trial of the original action, detained in confinement. Some are simply detained awaiting trial, others are confined pursuant to misdemeanor convictions; none is subject to any voting disability under the laws of New York.

The Court of Appeals of New York,[1] by divided vote, held that failure of the State to provide appellants with any means of registering and voting was not a violation of the New York statutes and not a denial of any federal or state constitutional right.

Before the November 1972 general elections in New York, the appellants applied to the authorities of Monroe County, including the Board of Elections, to establish a mobile voters registration unit in the county jail in compliance with a mobile registration procedure which had been employed in some county jails in New York State. This request was denied and appellants then requested that they be either transported to polling places under appropriate restrictions or, in the alternative, that they be permitted to register and vote under New York's absentee voting provisions which, essentially, provide that qualified voters are allowed to register and vote by absentee measures if they are unable to appear personally because of illness or physical disability, or because of

**Louis J. Lefkowitz, pro se,* Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *William J. Kogan,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

[1] 31 N. Y. 2d 317, 291 N. E. 2d 134 (1972).

their "duties, occupation or business." The statutes also allow absentee voting, but not registration, if the voter is away from his residence on election day because he is confined in a veterans' hospital or is away on vacation.[2]

[2] At the time this permit was sought, N. Y. Election Law § 153-a (Supp. 1971–1972) provided, in pertinent part:

"1. A voter residing in an election district in which the registration is required to be personal or in an election district in a county or city in which permanent personal registration is in effect, and who is unable to appear personally for registration because he is confined at home or in a hospital or institution, other than a mental institution because of illness or physical disability or because his duties, occupation or business require him to be outside the county of residence, or if a resident of the city of New York, outside said city, on such days, may be registered in the manner provided by this section. A voter residing in an election district in which personal registration is not required may file an application for absentee registration in accordance with the provisions of this section and also may be registered in the manner otherwise provided by law."

Effective January 1, 1973, § 153-a was repealed, and replaced by N. Y. Election Law § 153 (Supp. 1972–1973), which contains substantially identical provisions.

N. Y. Election Law § 117-a (1964) provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be unable to appear personally at the polling place of the election district in which he is a qualified voter because of illness or physical disability, may also vote as an absentee voter under this chapter . . . ."

N. Y. Election Law § 117 (1964) provides, in pertinent part:

"1. A qualified voter, who, on the occurrence of any general election, may be—

"a. unavoidably absent from his residence because he is an inmate of a veterans' bureau hospital, or

"b. unavoidably absent from the county of his residence, or, if a resident of the city of New York from said city, because his duties, occupation or business require him to be elsewhere on the day of election, or

"c. absent from the county of his residence, or, if a resident of the city of New York from said city, because he is on vacation elsewhere on the day of election,

"may vote as an absentee voter under this chapter."

The election authorities denied the request, taking the position that they were under no obligation to permit the appellants to register or to vote in person and that inmates did not qualify for absentee voting under the provisions of the New York statutes.

The Supreme Court for Monroe County in New York considered the claims presented by the appellants and treated them as a proceeding in the nature of mandamus. The conclusion reached by that court was that the legislature of New York had provided for absentee registration and voting by any voter unable to appear personally because of confinement in an institution (other than a mental institution). The court concluded that the election laws should be construed to apply to an inmate confined in jail and not otherwise disenfranchised since this constituted a "physical disability" in the sense that he was physically disabled from leaving his confinement to go to the polls to vote, and that the statute therefore entitled such persons to vote by absentee ballot. However, the court noted that there was no showing that any of the persons claiming these rights had timely filed all the necessary forms but that this could yet be accomplished in time for voting by absentee ballot in November 1972. The Appellate Division of the Fourth Judicial Department of the Supreme Court of New York on review gave a similar construction to the election laws, stating:

> "We believe that petitioners, being so confined, are physically disabled from voting and should be permitted to do so by casting absentee ballots." 40 App. Div. 2d 942, 337 N. Y. S. 2d 700 (1972).

On appeal to the New York Court of Appeals, however, these holdings were reversed, that court stating:

> "The right to vote does not protect or insure against those circumstances which render voting impracti-

cable. The fact of incarceration imposes many other disabilities, some private, others public, of which voting is only one. Under the circumstances, and in view of the Legislature's failure to extend these absentee provisions to others similarly disadvantaged, it hardly seems plausible that petitioners' right to vote has been arbitrarily denied them. It is enough that these handicaps, then, are functions of attendant impracticalities or contingencies, not legal design." 31 N. Y. 2d 317, 320–321, 291 N. E. 2d 134, 136–137.

Judge Fuld dissented, being of the view that §§ 117–a and 153–a of the Election Law of New York should be read in the manner announced by the Appellate Division. Judge Burke, joining Judge Fuld, agreed, stating additionally that any construction of the election law precluding appellants from exercising their right to register and vote violated the equal protection guarantees of the Fourteenth Amendment.

It is important to note at the outset that the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct. As we noted earlier, these appellants are not disabled from voting except by reason of not being able physically—in the very literal sense—to go to the polls on election day or to make the appropriate registration in advance by mail. The New York statutes are silent concerning registration or voting facilities in jails and penal institutions, except as they provide for absentee balloting. If a New York resident eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote and he may also register by mail, presumably because he is "unavoidably absent from

the county of his residence." N. Y. Election Law § 117 (1)(b) (1964).[3]

Thus, under the New York statutes, two citizens awaiting trial—or even awaiting a decision whether they are to be charged—sitting side by side in the same cell, may receive different treatment as to voting rights. As we have noted, if the citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county. Although neither is under any legal bar to voting, one of them can vote by absentee ballot and the other cannot.

This Court had occasion to examine claims similar to those presented here in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969). There a state statute provided for absentee voting by persons "medically incapacitated" and for pretrial detainees who were incarcerated outside their county of residence. Unlike the present case, however, in *McDonald* "there [was] nothing in the record to show that appellants [were] in fact absolutely prohibited from voting by the State . . . ," *id.,* at 808 n. 7, since there was the possibility that the State might furnish some other alternative means of voting. *Id.,* at 808. Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof.

More recently in *Goosby* v. *Osser,* 409 U. S. 512 (1973), the Court again considered the problem of inmate voting and concluded that, unlike the voting restrictions in the *McDonald* case, the statute there in question was an

[3] At oral argument, counsel for the appellees conceded that Monroe County election officials have interpreted the portions of New York Election Laws §§ 117 and 153-a that extend absentee voting and registration privileges to those whose "duties, occupation or business" requires absence from their home counties as including convicted misdemeanants and pretrial detainees incarcerated outside Monroe County.

absolute bar to voting because of a specific provision that "persons confined in a penal institution" were not permitted to vote by absentee ballot. It is clear, therefore, that the appellants here, like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed.

New York's election statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary. As we have noted, New York extends absentee *registration* privileges to eligible citizens who are unable to appear personally because of "illness or physical disability," and to citizens required to be outside their counties of residence on normal registration days because of their "duties, occupation or business." In addition, New York extends absentee *voting* privileges to those voters unable to get to the polls because of illness or physical disability, to those who are inmates of veterans' bureau hospitals, and to those who are absent from their home county on election day either because of "duties, occupation or business" or vacation. Indeed, those held in jail awaiting trial in a county other than their residence are also permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reason in the county of their residence are completely denied the ballot. The New York statutes, as construed, operate as a restriction which is "so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise." *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973). Appellants and others similarly situated are, as we have noted, under no legal disability impeding their legal right to register or to vote; they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote.

The construction given the New York statutes by its trial court and the Appellate Division may well have been a reasonable interpretation of New York law, but the highest court of the State has concluded otherwise and it is not our function to construe a state statute contrary to the construction given it by the highest court of a State. We have no choice, therefore, but to hold that, as construed, the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

Reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring.

While I join the opinion of the Court, my analysis of the issues presented here requires further elaboration.

I fully agree with the Court's holding that the Court of Appeals' reliance on our decision in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969), was misplaced. Although we rejected in *McDonald* a claim similar to that presented by appellants here, the crux of our decision was our conclusion that the rational-basis test was the proper standard to apply in evaluating the prisoners' equal protection claims. We relied heavily in *McDonald* on the fact that there was no evidence that the State made it impossible for the appellants to exercise their right to vote. As the Court noted,

> "[T]he record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow

some inmates to get to the polls on their own." *Id.*, at 808 n. 6.

The Court therefore characterized the appellants' claim by saying "[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.*, at 807. Because of the relatively trivial inconvenience encountered by a voter unable to vote by absentee ballot when other means of exercising the right to vote are available, the Court properly rejected appellants' contention that strict scrutiny of the statutory classifications was required.

In this case, however, the New York Court of Appeals has made clear that the fundamental premises on which *McDonald* was based are absent. See *Goosby* v. *Osser*, 409 U. S. 512, 518–522 (1973). The New York court "reject[ed] out of hand" any alternative which would permit appellants to vote without using absentee ballots.[1] In this posture, it can no longer be contended that this case involves "merely a claimed right to absentee ballots" and "not the right to vote," or that the challenged statutes "have no direct impact on [appellants'] right to vote," as the Court of Appeals, relying on *McDonald*, argued, 31 N. Y. 2d 317, 320, 291 N. E. 2d 134, 136; such statements, in the context of this case, fly in the face of reality. Nor can it be contended that denial of absentee ballots to appellants does not deprive them

[1] The Court of Appeals stated:

"We reject out of hand any scheme which would commit respondents to a policy of transporting such detainees to public polling places; would assign them the responsibility of providing special voting facilities under such conditions [or] would threaten like hazards embraced by such schema." 31 N. Y. 2d 317, 319, 291 N. E. 2d 134, 135 (1972).

Presumably this includes a flat rejection of the possibility of temporary reductions in bail to allow detainees to vote suggested by the Court in *McDonald*.

of their right to vote any more than it deprives others who may "similarly" find it "impracticable" to get to the polls on election day, see *id.*, at 320–321, 291 N. E. 2d, at 136–137; here, it is the State which is both physically preventing appellants from going to the polls and denying them alternative means of casting their ballots. Denial of absentee registration and absentee ballots is effectively an absolute denial of the franchise to these appellants.

It is well settled that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein*, 405 U. S. 330, 337 (1972), quoting *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); see also *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 205, 209 (1970). It is this standard of review which must be employed here.

New York law provides for absentee registration and voting by numerous categories of voters who may be unable to appear in person at the polls. New York permits absentee registration and voting by, *inter alia*, those who are unable to appear personally because of illness or physical disability, or those whose duties, occupation, or business takes them out of their county of residence. Absentee ballots are even available to those who are on vacation outside the county on election day. Significantly, it is also conceded that pretrial detainees and convicted misdemeanants residing in Monroe County but confined *outside* the county may register and vote by mail.[2]

[2] As the Court emphasizes, New York law does not disenfranchise either convicted misdemeanants or persons being held for trial on criminal charges. Indeed, it appears that the New York Constitution does not permit such disenfranchisement. Article II, § 1, of the

In light of these extensive provisions for participation in the electoral process through the mail by others, New York's exclusion of pretrial detainees and convicted misdemeanants confined in the county of their residence cannot withstand analysis. The only basis even suggested for this discrimination is the possibility recognized by the Court in *McDonald* "that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates." 394 U. S., at 810. Though protection of the integrity of the ballot box is surely a legitimate state concern, I frankly find something a bit disturbing about this approach to the problem. It is hard to conceive how the State can possibly justify denying any person his right to vote on the ground that his vote might afford a state official the opportunity to abuse his position of authority. If New York truly has so little confidence in the integrity of its state officers, the time has come for the State to adopt stringent measures to prevent official misconduct, not to further penalize its citizens by depriving them of their right to vote. There are surely less burdensome means to protect inmate voters against attempts to influence their votes—the alternatives suggested by the Court in *McDonald*, for example.

I thus have little difficulty in concluding that the asserted state interest is insufficient to justify the statutes' discrimination against pretrial detainees and convicted misdemeanants under the compelling-state-interest test. I think it is clear that the State's denial of all opportunity for appellants to register and vote deprives them of the

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Constitution provides that "[e]very citizen shall be entitled to vote" and Art. II, § 3, excludes only those "convicted of bribery or of any infamous crime." We therefore need not confront in this case the very substantial constitutional problems presented if a State did seek to exclude these classes from the franchise.

right to vote on an equal basis with other citizens guaranteed under the Equal Protection Clause.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Once again, we are confronted with a claim, fashionable of late, that a state statute which, because of its positive provisions, *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973); *Kusper* v. *Pontikes*, *ante*, p. 51; see *Goosby* v. *Osser*, 409 U. S. 512 (1973), or because of its failure to provide particular persons particular relief, as here, is an unconstitutional deprivation of the right to vote. And once again the Court strikes down the state statutes.

Because I think the Court is unnecessarily and unwisely elevating and projecting constitutional pronouncement into an area—and into distant and obscure corners of that area—that, for me, should be a domain reserved for the State's own housekeeping, I dissent.

I join, and with some emphasis, the Court's observations and those of MR. JUSTICE MARSHALL in his concurring opinion, to the effect that the much-amended New York statutes here under challenge cut unevenly. Surely, no one would claim that they are now a model of the draftsman's art. The absentee-voting privilege appears to be available for the voter who is an inmate of a veterans' bureau hospital, N. Y. Election Law § 117 (1964), but not, seemingly, due to the statute's silence (unless he can otherwise qualify "because of illness or physical disability," *id.*, § 117-a), for the voter who is just as nonambulatory, and just as confined, in some municipal or denominational institution. It is available, under § 117, for the voter, "unavoidably absent" on business, and even for the voter "absent" on vacation, but not, seemingly, for the voter who is absent attending a wedding or visiting a seriously

ill relative in the next State. And it is concededly available for the occupant of the county jail who resides in another New York county but not for the occupant who resides in the local county.

These are irritating and less-than-thoughtful *sub silentio* distinctions, and the temptation to eliminate them by striking down the statutes is strong and appealing. I am not convinced, however, that we should be so ready to interfere. New York's present statutory structure has developed by successive remedial amendments, each designed to correct a then-apparent gap. The State, after all, as a matter of constitutional requirement, need not have provided for *any* absentee registration or absentee voting. And

> "a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. . . ." *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 809 (1969).

See also *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972).

Furthermore, this fallout from the New York statutes is minor and collateral and not of great, let alone constitutional, import. There is bound to be a dividing line somewhere, intended or unintended (as I suspect this was). If that dividing line operates to deprive a person of what he feels is his right to vote, his reaction will be critical. Whether he has a constitutional claim, however, is something else again. Line drawing is necessary, as the Court conceded in *Dunn* v. *Blumstein*, 405 U. S.

330, 348 (1972), and by the very process of line drawing, someone will be left out or treated differently.

I feel, therefore, that any unequal effect of the New York statutes is largely incidental and wholly a function of the State's failure to extend its remedial provisions a little further. These appellants are affected, to be sure, but they are affected because it was their misfortune to be detainees or convicted misdemeanants serving their sentences in the county jail on the critical day. The misdemeanants were in jail through their own doing, just as the petitioners in *Rosario* v. *Rockefeller, supra,* found themselves unable to vote because of their failure to meet an enrollment deadline. The plight of detainees elicits concern, of course, for a detainee may not be guilty of the offense with which he is charged. Yet the statutes' effect upon him, although unfortunate, produces a situation no more critical than the situation of the voter, just as unfortunate, who on election day is away attending the funeral of a loved one in a distant State. These are inequalities, but they are the incidental inequalities of life, and I do not regard them as unconstitutional.

I would refrain from continued tampering and interference with the details of state election laws. If details are deserving of cure, the State's legislature, not this Court, ought to be the curative agent.

AMERICAN PIPE & CONSTRUCTION CO. ET AL. *v.* UTAH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1195. Argued November 12, 1973—
Decided January 16, 1974

Eleven days short of a year after a final consent judgment had been entered against petitioners in civil actions by the Government to restrain federal antitrust violations (which actions had been filed almost four years before entry of that judgment), the State of Utah commenced a Sherman Act treble-damages class action against petitioners, in which the State purported to represent various state and local agencies and certain other Western States. The action was found to be timely under the federal four-year statute of limitations governing antitrust suits (§ 4B of the Clayton Act) because of § 5 (b) of that Act providing that whenever the United States institutes any proceeding to restrain antitrust violations, the running of the statute of limitations in respect of every private right of action arising under such laws and based on any matter complained of in such proceeding shall be suspended during the pendency thereof and for one year thereafter. The District Court thereafter granted petitioners' motion for an order pursuant to Fed. Rule Civ. Proc. 23 (c)(1) that the suit could not be maintained as a class action, the court finding that, although the prerequisites to a class action contained in Rule 23 (a)(2) through (4) had been met, the requirement of Rule 23 (a)(1) that "the class [be] so numerous that joinder of all members is impracticable" was not satisfied. Eight days after entry of this order, respondent towns, municipalities, and water districts, all of which had been claimed as members of the original class, moved to intervene as plaintiffs in Utah's action, either as of right under Fed. Rule Civ. Proc. 24 (a)(2) or by permission under Rule 24 (b)(2), but the District Court denied this motion, concluding that the limitation period had run as to all those respondents and had not been tolled by institution of the class action. The Court of Appeals reversed as to denial of permission to intervene under Rule 24 (b)(2), finding that as to the members of the class Utah purported

to represent, suit was actually commenced by Utah's filing of the class action. *Held:*

1. The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the requirement of Rule 23 (a) (1) been met, and here where respondents, who were purported members of the class, made timely motions to intervene after the District Court had found the suit inappropriate for class action status, the institution of the original class suit tolled the limitations statute for respondents. Pp. 552–556.

2. A judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts; the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. Pp. 556–559.

3. The District Court's determination in denying permission to intervene that respondents were absolutely barred by the statute of limitations, was not an unreviewable exercise of discretion but rather a conclusion of law which the Court of Appeals correctly found to be erroneous. Pp. 559–560.

4. The commencement of the class action suspended the running of the limitations period only during the pendency of the motion to strip the suit of its class action character. Since the class action was filed with 11 days yet to run in the period as tolled by § 5 (b), the intervenors had 11 days after entry of the order denying them participation in the class suit in which to move to file their intervention motion. Their filing only 8 days after the entry of such order was thus timely. Pp. 560–561.

473 F. 2d 580, affirmed.

STEWART, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, *post*, p. 561.

Jesse R. O'Malley argued the cause for petitioners. With him on the briefs were *Gordon Johnson, Oliver F. Green, Jr., James O. Sullivan, Wayne M. Pitluck, John J. Hanson, Robert E. Cooper, Haldor T. Benson,* and *Read Carlock.*

Gerald R. Miller, Special Assistant Attorney General of Utah, argued the cause for respondents. With him on the brief were *Vernon B. Romney*, Attorney General, and *J. Rand Hirschi* and *Kent Shearer*, Special Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts. While the question presented is a limited one, the details of the complex proceedings, originating almost a decade ago, must be briefly recounted.

On March 10, 1964, a federal grand jury returned indictments charging a number of individuals and companies, including the petitioners here, with criminal violations of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The indictments alleged that the defendants combined and conspired together in restraint of trade in steel and concrete pipe by submitting collusive and rigged bids for the sale of such pipe and by dividing and allocating business among themselves. Shortly thereafter, on June 19, 1964, pleas of *nolo contendere* were accepted and judgments of guilt were entered. Four days later, on June 23, 1964, the United States filed civil complaints in the United States District Court for the Central District of California against the same companies, which complaints, as subsequently amended, sought to restrain further violations of the Sherman Act and violations of the Clayton and False Claims Acts. These civil actions were the subject of extended negotiations between the Government and the defendants which culminated in a "Final Judgment," entered on May 24, 1968, in which the companies consented to a decree en-

joining them from engaging in certain specified future violations of the antitrust laws.[1]

Eleven days short of a year later, on May 13, 1969, the State of Utah commenced a civil action for treble damages against the petitioners in the United States District Court for the District of Utah, claiming that the petitioners had conspired to rig prices in the sale of concrete and steel pipe in violation of § 1 of the Sherman Act. The suit purported to be brought as a class action in which the State represented "public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from the defendants" and also those States in the "Western Area" which had not previously filed similar actions. This action was found to be timely under the federal statute of limitations governing antitrust suits[2] because of the provision of § 5 (b) of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 16 (b), which states that

> "[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended

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[1] Consent decrees binding each of the petitioners other than American Pipe & Construction Co. were entered on December 8, 1967; however, in an earlier action the District Court in Arizona determined that the "Final Judgment" entered on May 24, 1968, was final as to all petitioners. *Maricopa County* v. *American Pipe & Construction Co.*, 303 F. Supp. 77, 87 (1969).

[2] Section 4B of the Clayton Act, 15 U. S. C. § 15b, provides in pertinent part as follows:

"Any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued."

during the pendency thereof and for one year thereafter . . . ." [3]

Since the Government's civil actions against the petitioners had ended in a consent judgment entered on May 24, 1968, Utah's suit, commenced on May 13, 1969, was timely under § 5 (b), with 11 days to spare.[4]

On a motion made by the majority of the petitioners, the suit was subsequently transferred by the Judicial Panel on Multidistrict Litigation from Utah to the United States District Court for the Central District of California for trial by Judge Martin Pence, Chief Judge of the District of Hawaii, sitting in the California District by assignment. The transfer and assignment were found appropriate because of the prior concentration of more than 100 actions arising out of the same factual situation in the Central District of California before Judge Pence. *In re Concrete Pipe,* 303 F. Supp. 507, 508–509 (JPML 1969).

In November 1969 the petitioners moved for an order pursuant to Fed. Rule Civ. Proc. 23 (c)(1) that the suit could not be maintained as a class action.[5] This motion

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[3] The section contains the additional proviso that

"whenever the running of the statute of limitations . . . is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

[4] The petitioners had earlier argued that since there was a four-day hiatus between the entry of judgment on the pleas of *nolo contendere* in the criminal actions and the commencement of the Government civil suit, the tolling period provided by § 5 (b) should have begun to run from the termination of the criminal proceedings. This contention was rejected in *Maricopa County* v. *American Pipe & Construction Co., supra,* at 83–86, and has not been pressed here.

[5] Subdivision (c)(1) of Rule 23 provides:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be

was subsequently granted. In his memorandum opinion in support of the order granting the motion Judge Pence found that those "Prerequisites to a class action" contained in Rule 23 (a)(2) through (4) appeared to have been met, or at least that minor deficiencies in meeting those standards for determining the suitability of proceeding as a class would "not be fatal to the plaintiffs' class action." 49 F. R. D. 17, 20.[6] But the requirement of Rule 23 (a)(1) that "the class [be] so numerous that joinder of all members is impracticable" was found by Judge Pence not to be satisfied: While the complaint had alleged that the members of the class totaled more than 800, Judge Pence, relying on his extensive experience in dealing with litigation involving the same defendants and similar causes of action, concluded that the number of entities which ultimately could demonstrate injury from the trade practices of the petitioners was far lower, and, further, that "[f]rom prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable . . . . " 49 F. R. D., at 21.

On December 12, 1969, eight days after entry of the order denying class action status,[7] the respondents, con-

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conditional, and may be altered or amended before the decision on the merits."

[6] The "Prerequisites to a class action" listed in subdivision (a) of Rule 23 are as follows:

"One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[7] While the memorandum in support of the order denying class action status was dated December 17, 1969, the order itself was filed on December 4, 1969.

sisting of more than 60 towns, municipalities, and water districts in the State of Utah, all of which had been claimed as members of the original class, filed motions to intervene as plaintiffs in Utah's action either as of right, under Rule 24 (a)(2) [8] or, in the alternative, by permission under Rule 24 (b)(2),[9] and for other relief not pertinent here. On March 30, 1970, the District Court denied the respondents' motion in all respects, concluding that the limitations period imposed by § 4B of the Clayton Act, as tolled by § 5 (b), had run as to all these respondents and had not been tolled by the institution of the class action in their behalf. 50 F. R. D. 99.

On appeal, the Court of Appeals for the Ninth Circuit affirmed as to the denial of leave to intervene as of right under Rule 24 (a)(2), but, with one judge dissenting, reversed as to denial of permission to intervene

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[8] "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[9] "Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

under Rule 24 (b)(2).[10] 473 F. 2d 580. Finding that "as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing," the appellate court concluded that "[i]f the order [denying class action status], through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed, and the rights they presently possessed. It cannot leave them temporally stranded in the present." *Id.*, at 584. We granted certiorari to consider a seemingly important question affecting the administration of justice in the federal courts. 411 U. S. 963.

I

Under Rule 23 as it stood prior to its extensive amendment in 1966, 383 U. S. 1047–1050, a so-called "spurious" class action could be maintained when "the character of the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." [11] The Rule, however, contained no mechanism

[10] As originally filed, the respondents' motions to intervene included allegations based on events occurring during the four years prior to December 12, 1969, the date of the filing of the motions. The denial of leave to intervene did not apply to these allegations, which were still timely as to the respondents even under the District Court's order, and the order was thus not appealable as a final order under 28 U. S. C. § 1291. Furthermore, in the same order the court declined to certify the question of the tolling effect of the class action as an appealable order under 28 U. S. C. § 1292 (b). 50 F. R. D. 99, 109–110. The respondents subsequently amended their complaint to confine its allegations to events more than four years prior to the filing of their motions, thereby making the court's order final as to them and permitting immediate appeal under 28 U. S. C. § 1291.

[11] Original Rule 23 provided as follows:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the

for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, "[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3B J. Moore, Federal Practice ¶ 23.10 [1], p.

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court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Secondary action by shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

"(c) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

23–2603 (2d ed.). Cf. *Snyder* v. *Harris*, 394 U. S. 332, 335; *Zahn* v. *International Paper Co.*, *ante*, at 296 and n. 6. A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called "one-way intervention"—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.[12] The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.[13]

Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court "[a]s soon as practicable after the commencement of an action brought as a class action . . . ." Rule 23 (c)(1).[14] Once it is determined that the action may be maintained as a class action under subdivision

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[12] See, *e. g.*, Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958); 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 568 (C. Wright ed. 1961).

[13] See Advisory Committee's Note to Proposed Rule 23 of Rules of Civil Procedure, 28 U. S. C. App., pp. 7765, 7768.

[14] See n. 5, *supra*.

(b)(3),[15] the court is mandated to direct to members of the class "the best notice practicable under the circumstances" advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23(c)(2).[16] Finally, the present Rule provides that in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested ex-

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[15] Subsection (b)(3) of Rule 23, allowing maintenance of a class action in situations generally analogous to those covered by the "spurious" class suit under former Rule 23, provides that an action may be maintained as a class action "if the prerequisites of subdivision (a) are satisfied," and in addition:

"the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[16] "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

clusion. Rule 23(c)(3).[17] Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

Under former Rule 23, there existed some difference of opinion among the federal courts of appeals and district courts as to whether parties should be allowed to join or intervene as members of a "spurious" class after the termination of a limitation period, when the initial class action complaint had been filed before the applicable statute of limitations period had run. A majority of the courts ruling on the question, emphasizing the representative nature of a class suit, concluded that such intervention was proper.[18] Other courts concluded that since a "spurious" class action was essentially a device

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[17] "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

[18] *York* v. *Guaranty Trust Co.*, 143 F. 2d 503 (CA2 1944), rev'd on other grounds, 326 U. S. 99; *Escott* v. *Barchris Construction Corp.*, 340 F. 2d 731 (CA2 1965); *DePinto* v. *Provident Security Life Insurance Co.*, 323 F. 2d 826 (CA9 1963); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (CA10 1961).

to permit individual joinder or intervention, each individual so participating would have to satisfy the timeliness requirement.[19] This conflict in the implementation of the former Rule was never resolved by this Court.

Under present Rule 23, however, the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated, and there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.[20] Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a "separate cause of action" which must individually meet the timeliness requirements, *Athas* v. *Day*, 161 F. Supp. 916, 919 (Colo. 1958), such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were "typical of the claims or defenses of the class" and would "fairly and adequately protect the interests of the class," Rule 23 (a)(3), (4),

[19] *Pennsylvania Co. for Insurances* v. *Deckert*, 123 F. 2d 979 (CA3 1941); *Athas* v. *Day*, 161 F. Supp. 916 (Colo. 1958). The cases arising under former Rule 23 are discussed and analyzed in Simeone, Procedural Problems of Class Suits, 60 Mich. L. Rev. 905 (1962); Note, Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale, 13 Vill. L. Rev. 370 (1968).

[20] The courts that have dealt with this problem under present Rule 23 have reached this conclusion. *Esplin* v. *Hirschi*, 402 F. 2d 94 (CA10 1968); *Philadelphia Elec. Co.* v. *Anaconda Am. Brass Co.*, 43 F. R. D. 452 (ED Pa. 1968).

the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23 (b)(3).

We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit.[21] Rule

[21] In *York* v. *Guaranty Trust Co., supra,* the Court of Appeals for the Second Circuit permitted joinder in a "spurious" class suit on the reasoning that to rule otherwise would create a "trap for the unwary" who might refrain from instituting suit on the supposition that their interests were represented in the class suit. 143 F. 2d, at 529. As a member of that court subsequently observed, the contrary rule could be a "trap" only for those who were aware of and relied upon the commencement of the class suit. *Escott* v. *Barchris Construction Corp.*, 340 F. 2d, at 735 (Friendly, J., concurring). See also Comment, Spurious Class Actions Based upon Securities Frauds under the Revised Federal Rules of Civil Procedure, 35 Fordham L. Rev. 295, 308–309 (1966). In the present litigation, the District Court found that only seven of the more than 60 intervenors were

23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. During the pendency of the District Court's determination in this regard, which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

II

In the present case the District Court ordered that the suit could *not* continue as a class action, and the participation denied to the respondents because of the running of the limitation period was not membership in the class, but rather the privilege of intervening in an individual suit pursuant to Rule 24 (b)(2).[22] We hold that in this posture, at least where class action status has been denied

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aware of and relied on the attempted class suit. 50 F. R. D., at 101 and n. 1.

[22] The petition for certiorari did not, of course, present the question of whether intervention as of right under Rule 24 (a)(2) was properly denied by the District Court, and we do not reach that question. Our conclusion as to the effect of the commencement of a class suit on tolling the statute of limitations as to those who subsequently move to intervene by permission under Rule 24 (b)(2) would apply *a fortiori* to intervenors as of right under Rule 24 (a)(2).

solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. As the Court of Appeals was careful to note in the present case, "[m]aintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy)[,] not for lack of standing of the representative, or for reasons of bad faith or frivolity." 473 F. 2d, at 584. (Footnote omitted.)

A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket,[23] a rule requiring successful

[23] As indicated, *supra*, at 543, Judge Pence based his conclusion that the number of potential members was not so large as to make joinder impracticable on inferences from his prior experience with similar antitrust litigation against the same defendants. Not only would a district court's estimate of the expected attrition among the class of plaintiffs be difficult for any individual plaintiff to predict, but other federal courts have indicated that subsequent attrition will not be considered as a factor affecting numerosity under Rule 23 (a)(1) when considered at the outset of the case. See, *e. g., Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 401 (SD Iowa

anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.[24]

This rule is in no way inconsistent with the functional operation of a statute of limitations. As the Court stated in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, statutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.*, at 348–349. The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428, are satisfied when, as here, a named plaintiff who is found

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1968); 3B J. Moore, Federal Practice ¶ 23.05, p. 23–279 (2d ed.). Indeed, one commentator has observed that "[t]he federal decisions under original Rule 23 (a) reflect . . . contrariety of opinion as to the meaning of 'numerous.'" *Id.*, at 23–272.

[24] The Advisory Committee's Note on Proposed Rule 23 observes on the issue resolved here only that the question "whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the laws governing . . . limitations as they apply in particular contexts." 28 U. S. C. App., p. 7767.

to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.[25]

Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchant, see, *e. g.*, American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972); H. Friendly, Federal Jurisdiction: A General View 118–120 (1973); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Col. L. Rev. 1, 5–12 (1971); Handler, Twenty-Fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 34–42 (1972), this interpretation of the Rule

[25] As Judge Friendly has noted, in certain situations the intervenors may raise issues not presented in the class action complaint and to that extent the defendants will not have received notice of the nature of the claims against them. *Escott* v. *Barchris Construction Corp.*, 340 F. 2d, at 735 (concurring opinion). This problem, however, will be minimized when, as here, the District Court has already found that the named plaintiffs' claims typify those of the class. Furthermore, under Rule 23 (d)(3) "the court may make appropriate orders . . . imposing conditions on . . . intervenors."

is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

III

The petitioners contend, however, that irrespective of the policies inherent in Rule 23 and in statutes of limitations, the federal courts are powerless to extend the limitation period beyond the period set by Congress because that period is a "substantive" element of the right conferred on antitrust plaintiffs and cannot be extended or restricted by judicial decision or by court rule.[26] Unlike the situation where Congress has been silent as to the period within which federal rights must be asserted,[27] in the antitrust field Congress has specified a precise limitation period, and further has provided for a tolling period in the event that Government litigation is instituted. The inclusion of the limitation and the tolling period, the petitioners assert, makes the "substantive" statute immune from extension by "procedural" rules. They rely in large part on the Court's decision in *The Harris-*

[26] The Enabling Act empowering the Supreme Court to promulgate rules of procedure commands that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ." 28 U. S. C. § 2072.

[27] In such situations the federal courts have generally looked to local law as the source of a federal limitation period. "Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. [Citations omitted.] The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395. See *Auto Workers* v. *Hoosier Corp.*, 383 U S. 696. But see *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221.

burg, 119 U. S. 199, in which it was stated, with respect to state wrongful-death statutes,

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." *Id.,* at 214.

In *The Harrisburg,* however, the Court dealt with a situation where a plaintiff who was invoking the maritime jurisdiction of a federal court sought relief under a state statute providing for substantive liability.[28] The Court held that when a litigant in a federal court asserted a cause of action based upon a state statute he was bound by the limitation period contained within that statute rather than by a federal time limit. Cf. *Guaranty Trust Co.* v. *York,* 326 U. S. 99. But the Court in *The Harrisburg* did not purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be tolled. As we said in *Burnett, supra,* "[w]hile the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." 380 U. S., at 427 n. 2. The proper test is not whether a time

[28] The plaintiff in *The Harrisburg* initially claimed that federal maritime law afforded him a substantive cause of action for wrongful death. The Court held in that case that the federal maritime law did not extend to such suits. This holding was overruled in *Moragne* v. *States Marine Lines, Inc.,* 398 U. S. 375.

limitation is "substantive" or "procedural," but whether tolling the limitation in a given context is consonant with the legislative scheme.[29]

In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground. In *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, a railroad employee claiming rights under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, initially brought suit in a state court within the three-year time limitation specifically imposed by § 6 of the Act, 45 U. S. C. § 56. The state proceeding was subsequently dismissed because of improper venue. Immediately after the dismissal, but also after the running of the limitation period, the employee attempted to bring suit in federal court. Reversing determinations of the District Court and the Court of Appeals that the federal suit was time barred, the Court held that the commencement of the state suit fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period. See also *Herb* v. *Pitcairn*, 325 U. S. 77.

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[29] Our conclusion that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts is consistent with what scant legislative history there is on the limitation and tolling provisions. Sections 4B and 5 (b) of the Clayton Act were added to the antitrust laws in 1955, long after the original substantive liabilities were established. During debate a member of the House Judiciary Committee reporting the bill was asked, "[A]m I correct in assuming that this limitation provided by this amendment is strictly a procedural limitation and has nothing to do with substance?" to which he replied: "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955) (remarks of Reps. Murray and Quigley).

Similarly, in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, *Glus* v. *Brooklyn Eastern Terminal,* 359 U. S. 231, or because of fraudulent concealment, *Holmberg* v. *Armbrecht,* 327 U. S. 392, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant. In *Glus, supra,* the Court specifically rejected a contention by the defendant that when "the time limitation is an integral part of a new cause of action . . . that cause is irretrievably lost at the end of the statutory period." 359 U. S., at 232. To the contrary, the Court found that the strict command of the limitation period provided in the federal statute was to be suspended by considerations "[d]eeply rooted in our jurisprudence." *Ibid.*

These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

IV

Finally, the petitioners urge that the Court of Appeals' reversal of the District Court for failure to permit intervention under Rule 24 (b)(2) was nonetheless improper because the District Court in denying such permission was doing no more than exercising a legal discretion which the Court of Appeals did not find to be abused.[30] They point out that Rule 24 (b) explicitly refers to a district judge's permission to intervene as an exercise of

[30] The dissenting judge in the Court of Appeals based his conclusion on this ground. 473 F. 2d, at 584.

discretion,[31] and that this Court has held that "[t]he exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown . . . ." *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142; see also *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, 524.

In denying permission to intervene in this case, however, Judge Pence did not purport to weigh the competing considerations in favor of and against intervention, but simply found that the prospective intervenors were absolutely barred by the statute of limitations. This determination was not an exercise of discretion, but rather a conclusion of law which the Court of Appeals correctly found to be erroneous. The judgment of the Court of Appeals reversing the District Court's order directed that the case be remanded "for further proceedings upon the motions [to intervene]." 473 F. 2d, at 584. Rather than reviewing an exercise of discretion, the Court of Appeals merely directed that discretion be exercised.[32]

V

It remains to determine the precise effect the commencement of the class action had on the relevant

[31] Rule 24 (b) concludes, "*In exercising its discretion* [as to whether to permit intervention] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (Emphasis added.)

[32] Furthermore, there is persuasive intrinsic evidence that Judge Pence ruled against the respondents only on the issue of the applicability of the statute of limitations. First, his original conclusion that joinder was a more practicable remedy, 49 F. R. D., at 20, would be incongruous if immediately thereafter he asserted that intervention was, in fact, impracticable. Second, as noted previously, n. 10, *supra*, the District Court did not deny leave to intervene as to those who confined the allegations of their complaints to events occurring less than four years prior to the motions to intervene.

limitation period. Section 5 (b) of the Clayton Act provides that the running of the statutes of limitations be "suspended" by the institution of a Government antitrust suit based on the same subject matter. The same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character. The class suit brought by Utah was filed with 11 days yet to run in the period as tolled by § 5 (b), and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely.

The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and concur in its judgment. Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

As the Court has indicated, the purpose of statutes of limitations is to prevent surprises "through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348–349 (1944). Under our decision today, intervenors as of

right will be permitted to press their claims subject only to the requirement that they have an interest relating to the property or transaction and be impaired or impeded in their ability to protect that interest. Fed. Rule Civ. Proc. 24 (a). Such claims, therefore, invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit, and the defendant will not be prejudiced by later intervention, should class relief be denied. Permissive intervenors may be barred, however, if the district judge, in his discretion, concludes that the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule Civ. Proc. 24 (b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

The provision in Fed. Rule Civ. Proc. 23 (c)(1), that an order allowing the maintenance of a suit as a class action "may be conditional, and may be altered or amended before the decision on the merits," could be viewed to generate uncertainty under the Court's decision, for the class aspect might be disbanded after the litigation has long been underway. Rule 23 (c)(1), of course, provides that the court shall decide whether a class action may be maintained "[a]s soon as practicable after the commencement of an action." This decision, therefore, will normally be made expeditiously. And any later alteration with respect to intervention is subject to the discretionary elements of Rule 24 (b), mentioned above, and to Rule 23 (d)(3)'s provision that "the court may make appropriate orders . . . imposing conditions . . . on intervenors."

Syllabus

LAU ET AL. *v.* NICHOLS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-6520. Argued December 10, 1973—Decided January 21, 1974

The failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, or to provide them with other adequate instructional procedures, denies them a meaningful opportunity to participate in the public educational program and thus violates § 601 of the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance," and the implementing regulations of the Department of Health, Education, and Welfare. Pp. 565–569.

483 F. 2d 791, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 569. WHITE, J., concurred in the result. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 571.

Edward H. Steinman argued the cause for petitioners. With him on the briefs were *Kenneth Hecht* and *David C. Moon.*

Thomas M. O'Connor argued the cause for respondents. With him on the brief were *George E. Krueger* and *Burk E. Delventhal.*

Assistant Attorney General Pottinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Deputy Solicitor General Wallace, Mark L. Evans,* and *Brian K. Landsberg.**

*Briefs of *amici curiae* urging reversal were filed by *Stephen J. Pollak, Ralph J. Moore, Jr., David Rubin,* and *Peter T. Galiano* for

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The San Francisco, California, school system was integrated in 1971 as a result of a federal court decree, 339 F. Supp. 1315. See *Lee* v. *Johnson*, 404 U. S. 1215. The District Court found that there are 2,856 students of Chinese ancestry in the school system who do not speak English. Of those who have that language deficiency, about 1,000 are given supplemental courses in the English language.[1] About 1,800, however, do not receive that instruction.

This class suit brought by non-English-speaking Chinese students against officials responsible for the operation of the San Francisco Unified School District seeks relief against the unequal educational opportunities, which are alleged to violate, *inter alia*, the Fourteenth Amendment. No specific remedy is urged upon us.

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the National Education Assn. et al.; by *W. Reece Bader* and *James R. Madison* for the San Francisco Lawyers' Committee for Urban Affairs; by *J. Harold Flannery* for the Center for Law and Education, Harvard University; by *Herbert Teitelbaum* for the Puerto Rican Legal Defense and Education Fund, Inc.; by *Mario G. Obledo, Sanford J. Rosen, Michael Mendelson,* and *Alan Exelrod* for the Mexican American Legal Defense and Educational Fund et al.; by *Samuel Rabinove, Joseph B. Robison, Arnold Forster,* and *Elliot C. Rothenberg* for the American Jewish Committee et al.; by *F. Raymond Marks* for the Childhood and Government Project; by *Martin Glick* for Efrain Tostado et al.; and by the Chinese Consolidated Benevolent Assn. et al.

[1] A report adopted by the Human Rights Commission of San Francisco and submitted to the Court by respondents after oral argument shows that, as of April 1973, there were 3,457 Chinese students in the school system who spoke little or no English. The document further showed 2,136 students enrolled in Chinese special instruction classes, but at least 429 of the enrollees were not Chinese but were included for ethnic balance. Thus, as of April 1973, no more than 1,707 of the 3,457 Chinese students needing special English instruction were receiving it.

Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

The District Court denied relief. The Court of Appeals affirmed, holding that there was no violation of the Equal Protection Clause of the Fourteenth Amendment or of § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, which excludes from participation in federal financial assistance, recipients of aid which discriminate against racial groups, 483 F. 2d 791. One judge dissented. A hearing en banc was denied, two judges dissenting. *Id.*, at 805.

We granted the petition for certiorari because of the public importance of the question presented, 412 U. S. 938.

The Court of Appeals reasoned that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system," 483 F. 2d, at 797. Yet in our view the case may not be so easily decided. This is a public school system of California and § 71 of the California Education Code states that "English shall be the basic language of instruction in all schools." That section permits a school district to determine "when and under what circumstances instruction may be given bilingually." That section also states as "the policy of the state" to insure "the mastery of English by all pupils in the schools." And bilingual instruction is authorized "to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language."

Moreover, § 8573 of the Education Code provides that no pupil shall receive a diploma of graduation from grade 12 who has not met the standards of proficiency in "English," as well as other prescribed subjects. Moreover, by § 12101 of the Education Code (Supp. 1973) children between the ages of six and 16 years are (with exceptions not material here) "subject to compulsory full-time education."

Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, to reverse the Court of Appeals.

That section bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." The school district involved in this litigation receives large amounts of federal financial assistance. The Department of Health, Education, and Welfare (HEW), which has authority to promulgate regulations prohibiting discrimination in federally assisted school systems, 42 U. S. C. § 2000d–1, in 1968 issued one guideline that "[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the

opportunity to obtain the education generally obtained by other students in the system." 33 Fed. Reg. 4956. In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to students who had "linguistic deficiencies," 35 Fed. Reg. 11595.

By § 602 of the Act HEW is authorized to issue rules, regulations, and orders [2] to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601. HEW's regulations, 45 CFR § 80.3 (b)(1), specify that the recipients may not

> "(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> . . . . . .
>
> "(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program."

Discrimination among students on account of race or national origin that is prohibited includes "discrimination . . . in the availability or use of any academic . . . or

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[2] Section 602 provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ." 42 U. S. C. § 2000d–1.

other facilities of the grantee or other recipient." *Id.*, § 80.5 (b).

Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." *Id.*, § 80.3 (b)(2).

It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.[3] In 1970 HEW issued clarifying guidelines, 35 Fed. Reg. 11595, which include the following:

"Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

"Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track."

Respondent school district contractually agreed to "comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the

[3] And see Report of the Human Rights Commission of San Francisco, Bilingual Education in the San Francisco Public Schools, Aug. 9, 1973.

Regulation" of HEW (45 CFR pt. 80) which are "issued pursuant to that title . . ." and also immediately to "take any measures necessary to effectuate this agreement." The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma* v. *CSC*, 330 U. S. 127, 142–143. Whatever may be the limits of that power, *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 *et seq.*, they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said: [4]

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

We accordingly reverse the judgment of the Court of Appeals and remand the case for the fashioning of appropriate relief.

Reversed and remanded.

MR. JUSTICE WHITE concurs in the result.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the result.

It is uncontested that more than 2,800 schoolchildren of Chinese ancestry attend school in the San Francisco Unified School District system even though they do not speak, understand, read, or write the English language, and that as to some 1,800 of these pupils the respondent school authorities have taken no significant steps to deal with this language deficiency. The petitioners do not contend, however, that the respondents have affirmatively or intentionally contributed to this inadequacy, but only

[4] 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

that they have failed to act in the face of changing social and linguistic patterns. Because of this laissez-faire attitude on the part of the school administrators, it is not entirely clear that § 601 of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, standing alone, would render illegal the expenditure of federal funds on these schools. For that section provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

On the other hand, the interpretive guidelines published by the Office for Civil Rights of the Department of Health, Education, and Welfare in 1970, 35 Fed. Reg. 11595, clearly indicate that affirmative efforts to give special training for non-English-speaking pupils are required by Tit. VI as a condition to receipt of federal aid to public schools:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." [1]

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[1] These guidelines were issued in further clarification of the Department's position as stated in its regulations issued to implement Tit. VI, 45 CFR pt. 80. The regulations provide in part that no recipient of federal financial assistance administered by HEW may

"Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; [or]

"Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program." 45 CFR § 80.3 (b)(1)(ii), (iv).

The critical question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601.[2] Last Term, in *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369, we held that the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI [3] "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268, 280–281 (1969)." I think the guidelines here fairly meet that test. Moreover, in assessing the purposes of remedial legislation we have found that departmental regulations and "consistent administrative construction" are "entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U. S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434; *Udall* v. *Tallman*, 380 U. S. 1. The Department has reasonably and consistently interpreted § 601 to require affirmative remedial efforts to give special attention to linguistically deprived children.

For these reasons I concur in the result reached by the Court.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

I join MR. JUSTICE STEWART's opinion and thus I, too, concur in the result. Against the possibility that the Court's judgment may be interpreted too broadly, I

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[2] The respondents do not contest the standing of the petitioners to sue as beneficiaries of the federal funding contract between the Department of Health, Education, and Welfare and the San Francisco Unified School District.

[3] Section 602, 42 U. S. C. § 2000d–1, provides in pertinent part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way

stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. We may only guess as to why they have had no exposure to English in their preschool years. Earlier generations of American ethnic groups have overcome the language barrier by earnest parental endeavor or by the hard fact of being pushed out of the family or community nest and into the realities of broader experience.

I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

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of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

The United States as *amicus curiae* asserts in its brief, and the respondents appear to concede, that the guidelines were issued pursuant to § 602.

Syllabus

SEA-LAND SERVICES, INC. *v.* GAUDET, ADMINISTRATRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–1019. Argued November 7, 1973—Decided January 21, 1974

Respondent's husband, a longshoreman, was severely injured aboard petitioner's vessel in Louisiana navigable waters. Shortly after termination of an action based on unseaworthiness, in which he recovered damages for past and future wages, pain and suffering, and medical and incidental expenses, the husband died and respondent brought this maritime wrongful-death action for damages suffered by her. The District Court dismissed respondent's suit on grounds of *res judicata* and failure to state a claim. The Court of Appeals reversed, on the basis of *Moragne* v. *States Marine Lines*, 398 U. S. 375. *Held:* Respondent's maritime wrongful-death action is not barred by decedent's recovery in his lifetime for damages for his personal injuries. Pp. 575–595.

(a) *Moragne* v. *States Marine Lines, supra,* created a true wrongful-death remedy that is founded upon the death itself and is independent of any action the decedent may have had for his own personal injuries, and because respondent's suit thus involves a different cause of action from decedent's, it is not precluded by *res judicata*. Pp. 575–583.

(b) The maritime wrongful-death remedy permits a decedent's dependents to recover damages for loss of support, services, and society, as well as damages for funeral expenses. Pp. 583–591.

(c) All but the first of the foregoing elements of damages could not accrue until the decedent's death and therefore could not subject petitioner to double liability. Though there is an apparent overlap between a decedent's recovery for loss of future wages and the dependents' subsequent claim for support, the doctrine of collateral estoppel would bar dependents from recovering for loss of support to the extent that the decedent had recovered for future wages. Pp. 591–595.

463 F. 2d 1331, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J.,

filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 595.

Stuart A. McClendon argued the cause for petitioner. On the brief was *Richard L. Greenland.*

George W. Reese argued the cause for respondent. With him on the brief was *George M. Leppert.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Moragne v. *States Marine Lines*, 398 U. S. 375 (1970), overruling *The Harrisburg*, 119 U. S. 199 (1886), held that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law, but left the shaping of the new nonstatutory action to future cases. The question in this case is whether the widow of a longshoreman may maintain such an action for the wrongful death of her husband—alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters—after the decedent recovered damages in his lifetime for his injuries.

Respondent's husband suffered severe injuries while working as a longshoreman aboard petitioner's vessel, the S. S. *Claiborne*, in Louisiana navigable waters. He recovered $140,000 for his permanent disability, physical agony, and loss of earnings in an action based on unseaworthiness,[1] but died shortly after the action was terminated. Respondent brought this wrongful-death action in the District Court for the Eastern District of Louisiana for damages suffered by her. Based on her husband's recovery, the District Court dismissed the widow's suit on grounds of *res judicata* and failure to state a claim. The Court of Appeals for the Fifth Circuit reversed, holding that *Moragne* gave "Mrs. Gaudet . . . a compen-

[1] The jury reduced a verdict of $175,000 by 20% because of decedent's contributory negligence.

sable cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries . . . ." 463 F. 2d 1331, 1332 (1972). We granted certiorari, 411 U. S. 963 (1973), and now affirm.

I

The harshness of the *Harrisburg* rule that in the absence of a statute, there is no maritime action for wrongful death, was only partially relieved by enactment of federal and state wrongful-death statutes.[2] The Death

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[2] Wrongful-death statutes are to be distinguished from survival statutes. The latter have been separately enacted to abrogate the common-law rule that an action for tort abated at the death of either the injured person or the tortfeasor. Survival statutes permit the deceased's estate to prosecute any claims for personal injury the *deceased* would have had, but for his death. They do not permit recovery for harms suffered by the deceased's family as a result of his death. See *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59 (1913); Schumacher, Rights of Action Under Death and Survival Statutes, 23 Mich. L. Rev. 114 (1924) (hereafter Schumacher); Winfield, Death as Affecting Liability in Tort, 29 Col. L. Rev. 239 (1929); Livingston, Survival of Tort Actions, A Proposal for California Legislation, 37 Calif. L. Rev. 63 (1949); New York Law Revision Commission Report 157 *et seq.* (1935). The underlying reasons for survival statutes have been summarized by Professor Harper:

"At early common law, the personal representative could not be sued for a tort committed by the decedent during his lifetime. From early notions of the untransmittability of blame—and the quasi-criminal nature of early tort law must not be forgotten—to the crystallization of the maxim actio personalis moritur cum persona, the common law was developed without exception, and the rule was uniform that tort actions died with the parties, either wrongdoer or injured party. There was, then, no survival of a right of action either in favor of or against an executor or administrator until statutes modified somewhat the rule of dependability upon the lives of the original parties to the wrong." F. Harper, Law of Torts 673–674 (1933), quoted in 2 F. Harper & F. James, Law of Torts § 24.1 n. 2 (1956) (hereafter Harper & James). Survival statutes, in one form or another, have been enacted in over one-half the States and

on the High Seas Act, 41 Stat. 537, 46 U. S. C. §§ 761–768, created a wrongful-death action for death outside the three-mile limit.[3] The Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, incorporating the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. §§ 51–60, established such an action based on negligence for the wrongful death of a seaman regardless of the situs of the wrong; but otherwise, wrongful-death actions for deaths occurring on navigable waters within the three-mile territorial waters of a State depended upon whether the State had enacted a wrongful-death statute and, if so, whether the statute permitted recovery.[4]

Moragne reflected dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an adequate remedy for their losses. Three clearly unjust consequences were of particular concern:

> "The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. . . .
>
> "The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile

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supplement the state wrongful-death statutes, see W. Prosser, The Law of Torts § 126, p. 900 (4th ed. 1971) (hereafter Prosser), though in a small number of States the survival statute provides the only death remedy available, see 2 Harper & James § 24.2, p. 1288. The Federal Employers' Liability Act, 45 U. S. C. § 59, and the Jones Act, 46 U. S. C. § 688, but not the Death on the High Seas Act, 46 U. S. C. §§ 761–768, contain survival provisions.

[3] *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958).

[4] *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959).

limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. . . .

"The third, and assertedly the 'strangest' anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute (footnote omitted)." 398 U. S., at 395–396.

In overruling *The Harrisburg*, *Moragne* ended these anomalies by the creation of a uniform federal cause of action for maritime death, designed to extend to the dependents of maritime wrongful-death victims admiralty's "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages." *Id.*, at 387. Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this "special solicitude" to the dependents of the seafaring decedent.

Petitioner, Sea-Land Services, Inc. (Sea-Land), would attach no significance to this extension in shaping the maritime wrongful-death remedy. It argues that the wrongful-death remedy should recognize no loss independent of the decedent's claim for his personal injuries, and therefore that respondent had a wrongful-death remedy only "in the event Gaudet failed to prosecute [his own claim] during his lifetime." Brief for Petitioner 6. But *Moragne* had already implicitly rejected that argu-

ment; for we there recognized that a single tortious act might result in two distinct, though related harms, giving rise to two separate causes of action: "in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended." *Id.*, at 382. Thus, *Moragne* created a true wrongful-death remedy—founded upon the death itself and independent of any action the decedent may have had for his own personal injuries.[5] Because the respondent's suit involves a different cause of action, it is not precluded by *res judicata*. For *res judicata* operates only to bar

> "repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction

[5] Most wrongful-death statutes have also been construed to create an independent cause of action in favor of the decedent's dependents, see F. Tiffany, Death by Wrongful Act § 23 (2d ed. 1913) (hereafter Tiffany); 2 Harper & James § 24.2; Schumacher 121. Thus, for example, Coleridge, J., said of England's Lord Campbell's Act, "[I]t will be evident that this Act does not transfer this right of action to [the decedent's] representative, but gives to the representative a totally new right of action, on different principles," *Blake* v. *Midland R. Co.*, 18 Q. B. (Ad. & E., N. S.) *93, *110, 118 Eng. Rep. 35, 41 (1852). See also *Seward* v. *The Vera Cruz*, 10 App. Cas. 59, 70 (Lord Blackburn). Interpreting the wrongful-death provisions of the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, this Court described the action as "independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent," *Michigan C. R. Co.* v. *Vreeland*, 227 U. S., at 68.

> has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948).

To be sure, a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime. But the bar does not appear to rest in those cases so much upon principles of *res judicata* or public policy as upon statutory limitations on the wrongful-death action. As one authority has noted, "[t]he fact that all civil remedies for wrongful death derive from statute has important consequences. Since the right was unknown to common law, the legislatures which created the right were free to impose restrictions upon it." 2 Harper & James § 24.1, p. 1285. Thus, England's Lord Campbell's Act,[6] the first wrongful-death statute, permits recovery "whensoever the Death of a

[6] Lord Campbell's Act, 9 & 10 Vict., c. 93, An Act for compensating the Families of Persons killed by Accidents (Aug. 26, 1846):

"Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . . : Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act,

Person shall be caused by [the] wrongful Act . . . [of another] and the Act . . . is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof . . . ." Early English cases interpreting the Act held that this language conditioned wrongful-death recovery upon the existence of an actionable cause of the decedent at his death; [7] if the deceased had reduced his claim to judgment

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Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit the Action shall be brought . . . .

"III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint . . . ."

[7] See, *e. g.*, *Read* v. *Great Eastern R. Co.*, L. R. 3 Q. B. 555, 558, in which the court held:

"The question turns upon the construction of s. 1 of 9 & 10 Vict. (Lord Campbell's Act), c. 93. Before that statute the person who received a personal injury, and survived its consequences, could bring an action, and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law the 9 & 10 Vict. c. 93, was passed, and 'whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then . . . the person who would have been liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the

and settled with or released his tortfeasor, and therefore up to the time he died could not have maintained a further action for his injuries, his dependents could have no cause of action for his wrongful death. Since Lord Campbell's Act became the prototype of American wrongful-death statutes, most state statutes contained nearly identical language and have been similarly interpreted by state courts.[8] Though the federal wrongful-death statutes do

party injured.' Here, taking the plea to be true, the party injured could not 'maintain an action in respect thereof,' because he had already received satisfaction."

[8] See, *e. g.*, *Legg* v. *Britton*, 64 Vt. 652, 24 A. 1016 (1892); *Melitch* v. *United R. & E. Co.*, 121 Md. 457, 88 A. 229 (1913). This interpretation has been by no means universal. A number of courts interpreting Lord Campbell's Act-type state wrongful-death statutes have held that a wrongful-death action could be prosecuted even though before his death the decedent could not have brought a cause of action for his personal injuries because he had already recovered a judgment, settled, or released his claims. A classic statement of this view is that of the South Dakota Supreme Court in *Rowe* v. *Richards*, 35 S. D. 201, 215–216, 151 N. W. 1001, 1006 (1915):

"We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; and one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife."

The contrary interpretation of the pertinent statutory language has also been the subject of scholarly criticism. Professor Prosser argues: "It is not at all clear, however, that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the

not contain the same controversial language, the FELA, at least, has been held to be "essentially identical with" Lord Campbell's Act, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 69 (1913), and therefore similar restrictions have been placed on FELA wrongful-death recovery. *Mellon* v. *Goodyear*, 277 U. S. 335, 345 (1928).[9]

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first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent." Prosser § 127, p. 911. See also Schumacher 120–121; Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 608–610 (1962); Anno., 70 Am. St. Rep. 666, 684 (1898). In States where the limiting language of Lord Campbell's Act is absent from the wrongful-death statute, the courts have permitted wrongful-death actions although the decedent had already recovered for his own injuries, see, *e. g.*, *Blackwell* v. *American Film Co.*, 189 Cal. 689, 693–694, 209 P. 999, 1001 (1922).

[9] Beyond the common elements that the FELA may share with Lord Campbell's Act, express statutory terms peculiar to the FELA lend additional support for the result reached in *Mellon* v. *Goodyear*. The Act provides:

"Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or*, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence . . . of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . ." 45 U. S. C. § 51 (emphasis added).

The significant language, of course, is the use of the disjunctive "or." This language was understood by the Court of Appeals for the Fifth Circuit in *Seaboard Air Line R. Co.* v. *Oliver*, 261 F. 1, 2 (1919): "The two distinct rights of action are given in the alternative or disjunctively. The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employé and, in case of his death, by his personal representative; only one

Moragne, on the other hand, requires that the shape of the new maritime wrongful-death remedy (not a statutory creation but judge-made, see *The Tungus* v. *Skovgaard,* 358 U. S. 588, 611 (1959) (opinion of BRENNAN, J.)) be guided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," *The Sea Gull,* 21 F. Cas. 909 (No. 12,578) (C. C. Md. 1865), quoted in *Moragne,* 398 U. S., at 387. Since the policy underlying the remedy is to insure compensation of the dependents for *their* losses resulting from the decedent's death, the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries. No statutory language or "established and inflexible rules" of maritime law require a contrary conclusion.[10]

II

Sea-Land argues that, if dependents are not prevented from bringing a separate cause of action for wrongful death in cases where the decedent has already received a judgment for his personal injuries, then necessarily it

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recovery being allowed when the injured employé dies without having enforced the right of action given to him. It seems to be a fair inference from that language that the right of action given to the injured employé's personal representative was intended to be unenforceable after the enforcement and satisfaction of the one given to the employé himself."

[10] Significantly, the Death on the High Seas Act, 46 U. S. C. §§ 761–768, the only federal statute "that deals specifically and exclusively with actions for wrongful death . . . for breaches of the duties imposed by general maritime law," *Moragne* v. *States Marine Lines,* 398 U. S. 375, 407 (1970), has not been interpreted, as the FELA has been, to bar wrongful-death recovery in cases where the decedent has already recovered during his lifetime for his personal injuries.

will be subject to double liability. In order to evaluate this argument it is necessary first to identify the particular harms suffered by the dependents, for which the maritime wrongful-death remedy permits recovery of damages. In identifying these compensable harms, we are not without useful guides; for in *Moragne* we recognized that with respect to "particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." 398 U. S., at 408. Our review of those authorities, and the policies of maritime law, persuade us that, under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses.

Recovery for loss of support has been universally recognized,[11] and includes all the financial contributions

[11] See, *e. g.*, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S., at 70; *The S. S. Black Gull*, 90 F. 2d 619 (CA2 1937) (interpreting the Death on the High Seas Act); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971) (interpreting the Death on the High Seas Act); Tiffany §§ 153, 160; S. Speiser, Recovery for Wrongful Death § 3.4 (1966) (hereafter Speiser); Prosser § 127, p. 906. Damages for loss of support have also been awarded consistently in post-*Moragne* maritime wrongful-death actions. See, *e. g.*, *Dennis* v. *Central Gulf S. S. Corp.*, 323 F. Supp. 943 (ED La. 1971), aff'd, 453 F. 2d 137 (CA5 1972); *Petition of United States Steel Corp.*, 436 F. 2d 1256 (CA6 1970); *In re Cambria S. S. Co.*, 353 F. Supp. 691 (ND Ohio 1973); *Mascuilli* v. *United States*, 343 F. Supp. 439 (ED Pa. 1972); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (ED La. 1971); *Petition of Canal Barge Co.*, 323 F. Supp. 805 (ND Miss. 1971).

that the decedent would have made to his dependents had he lived. Similarly, the overwhelming majority of state wrongful-death acts [12] and courts interpreting the Death on the High Seas Act [13] have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death.[14] Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed.[15] Services the decedent performed at home or for his spouse are also compensable.[16]

Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.[17] Unquestionably, the deprivation of these

[12] Tiffany §§ 158–164; Speiser §§ 3.36, 3.40.

[13] *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583 (CA2 1961); *Dugas* v. *National Aircraft Corp., supra; Carli* v. *New London Flying Service, Inc.,* 1965 AMC 1644 (DC Conn. 1962).

[14] Such damages have also been recovered in post-*Moragne* maritime wrongful-death actions. See, *e. g., Dennis* v. *Central Gulf S. S. Corp., supra; Petition of United States Steel Corp., supra; In re Cambria S. S. Co., supra; Mascuilli* v. *United States, supra; In re Sincere Navigation Corp., supra; Petition of Canal Barge Co., supra.*

[15] See, *e. g., Michigan C. R. Co.* v. *Vreeland, supra,* at 71; *Moore-McCormack Lines, Inc.* v. *Richardson, supra; Gaydos* v. *Domabyl,* 301 Pa. 523, 152 A. 549 (1930).

[16] See, *e. g., Michigan C. R. Co.* v. *Vreeland, supra,* at 71, 74; *Carli* v. *New London Flying Service, Inc., supra; Alden* v. *Norwood Arena, Inc.,* 332 Mass. 267, 124 N. E. 2d 505 (1955); *Kroeger* v. *Safranek,* 165 Neb. 636, 87 N. W. 2d 221 (1957).

[17] Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the

benefits by wrongful death is a grave loss to the decedent's dependents. Despite this fact, a number of early wrongful-death statutes were interpreted by courts to preclude recovery for these losses on the ground that the statutes were intended to provide compensation only for "pecuniary loss," and that the loss of society is not such an economic loss.[18] Other wrongful-death statutes contain express language limiting recovery to pecuniary losses; [19] for example, the Death on the High

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latter represents an emotional response to the wrongful death. The difference between the two is well expressed as follows:

"When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. This requires a somewhat negative approach. The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have *contributed* in terms of support, assistance, training, comfort, consortium, etc. . . .

. . . . . .

"The great majority of jurisdictions, including several which do allow damages for other types of nonpecuniary loss, hold that the grief, bereavement, anxiety, distress, or mental pain and suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action." Speiser § 3.45, p. 223 (emphasis in original) (footnotes omitted).

[18] Lord Campbell's Act, which, by its terms, allows the jury to award "such damages as they may think proportional to the injury," was interpreted to permit recovery only for "pecuniary losses," *Blake* v. *Midland R. Co.*, 18 Q. B. (Ad. & E., N. S.) *93, 118 Eng. Rep. 35 (1852). Most American courts, interpreting similar wrongful-death statutes, followed suit, see, *e. g.*, *Michigan C. R. Co.* v. *Vreeland, supra,* at 70. See also Speiser § 3.1.

[19] A list of the States that have such statutes and reprints of the individual statutes may be found in Speiser § 3.1, p. 58 n. 5, and Appendix.

Seas Act limits recovery to "a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought . . . ," 46 U. S. C. § 762 (emphasis added), and consequently has been construed to exclude recovery for the loss of society.[20]

A clear majority of States, on the other hand, have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society.[21] This expansion of damages recoverable under wrongful-death statutes to include loss of society has led one commentator to observe that "[w]hether such damages are classified as 'pecuniary,' or recognized and allowed as non-pecuniary, the recent trend is unmistakably in favor of permitting such recovery." Speiser 218. Thus, our decision to permit recovery for loss of society aligns the

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[20] See, *e. g.*, *Middleton* v. *Luckenbach S. S. Co., Inc.*, 70 F. 2d 326 (CA2 1934); *First Nat. Bank in Greenwich* v. *National Airlines, Inc.*, 288 F. 2d 621 (CA2 1961).

[21] The various state and federal wrongful-death statutes have been closely canvassed and catalogued in Speiser (Supp. 1972) and Comment, Wrongful Death Damages in North Carolina, 44 N. C. L. Rev. 402 (1966). Those sources indicate that 27 of the 44 state and territorial wrongful-death statutes which measure damages by the loss sustained by the beneficiaries, permit recovery for loss of society. Alaska, Arkansas, Florida, Hawaii, Kansas, Mississippi, Nevada, West Virginia, Wisconsin, and Wyoming have statutes expressly providing for such damages. Arizona, Idaho, Louisiana, New Mexico, Puerto Rico, South Carolina, Utah, Virginia, and Washington have equivocal statutory language that has been judicially interpreted to include recovery for loss of society. Finally, the wrongful-death statutes of California, Delaware, Michigan, Minnesota, Montana, Pennsylvania, Texas, and the Virgin Islands, which either expressly or by judicial construction limit recovery to pecuniary losses, have been judicially interpreted, nevertheless, to permit recovery for the pecuniary value of the decedent's society.

maritime wrongful-death remedy with a majority of state wrongful-death statutes.[22] But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction.[23]

Objection to permitting recovery for loss of society often centers upon the fear that such damages are somewhat speculative and that factfinders will return

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[22] We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20 (1963). The scope and content of the general maritime remedy for wrongful death established in *Moragne* is no exception. After combing the legislative history of the Death on the High Seas Act, we concluded in *Moragne* that Congress expressed "no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U. S., at 400. Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death remedy which this Court might deem "appropriate to effectuate the policies of general maritime law." To the contrary, Congress' insistence that the Act not extend to territorial waters, see S. Rep. No. 216, 66th Cong., 1st Sess., 3 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess., 3 (1920); 59 Cong. Rec. 4482–4486 (1920), indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See *Greene* v. *Vantage S. S. Corp.*, 466 F. 2d 159 (CA4 1972).

[23] Insofar as *Simpson* v. *Knutsen*, 444 F. 2d 523 (CA9 1971), and *Petition of United States Steel Corp.*, 436 F. 2d 1256 (CA6 1970), are inconsistent with our holding, we disagree.

excessive verdicts.[24] We were not unaware of this objection in *Moragne*, where we said:

> "[O]ther courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes . . . does not present difficulties more insurmountable than assessment of damages for many nonfatal personal injuries." 398 U. S., at 385.

For example, juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium—which encompasses loss of society—in civil actions brought by husbands whose wives have been negligently injured.[25]

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[24] Of course, the maritime wrongful-death remedy is an admiralty action ordinarily tried to the court and not a jury. There are instances, however, where the admiralty action may be joined with a civil claim, for example, a claim based upon the Jones Act, see *Moragne*, 398 U. S., at 396 n. 12; *Peace* v. *Fidalgo Island Packing Co.*, 419 F. 2d 371 (CA9 1969), or a state survival statute, see *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971); *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (SDNY 1959); cf. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958), and a jury trial may be requested.

[25] See, *e. g.*, *Young* v. *Pridd*, 3 Cro. Car. 89, 79 Eng. Rep. 679 (Ex. Ch. 1627); *Hyde* v. *Scyssor*, 2 Cro. Jac. 538, 79 Eng. Rep. 462 (K. B. 1619); *Mowry* v. *Chaney*, 43 Iowa 609 (1876); *Guevin* v. *Manchester St. R.*, 78 N. H. 289, 99 A. 298 (1916); Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1 (1923); Lippman, The Breakdown of Consortium, 30 Col. L. Rev. 651 (1930); Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Col. L. Rev. 1341 (1961). Damages for loss of consortium have been awarded by courts of admiralty as well. See *N. Y. & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (CA3 1912); 1 E. Benedict, Admiralty 366 (6th ed. 1940) ("When a

More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed.[26] Relying on this history, the Florida Supreme Court recognized as early as 1899 that the damages for loss of society recovered by a wife for the wrongful death of her husband were "no more fanciful or speculative than the frugality, industry, usefulness, attention and tender solicitude of a wife [all of which a husband might recover at common law in an action for consortium], and the one can be compensated [as easily] by that simple standard of pecuniary loss . . . as the other." *Florida C. & P. R. Co.* v. *Foxworth*, 41 Fla. 1, 73, 25 So. 338, 348.

We are confident that the measure of damages for loss of society in a maritime wrongful-death action can "be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted." *The City of Panama*, 101 U. S. 453, 464 (1880). As in all damages awards for tortious injury, "[i]nsistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience," *Whitaker* v. *Blidberg Rothchild Co.*, 296 F. 2d 554, 555 (CA4 1961). Moreover, appellate tribunals have amply demonstrated their ability to control excessive awards, see, *e. g.*, *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (CA2 1961); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971).

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personal injury to a wife is maritime by locality, her husband may recover his damages for loss of her services, loss of consortium, etc., in admiralty"). But see *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (CA2 1963).

[26] See, *e. g.*, *Hitaffer* v. *Argonne Co.*, 87 U. S. App. D. C. 57, 183 F. 2d 811 (1950); Prosser § 125, p. 895; Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Col. L. Rev. 1341 (1961).

Finally, in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful-death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment. A majority of States provided for such recovery under their wrongful-death statutes.[27] Furthermore, although there is a conflict over whether funeral expenses are compensable under the Death on the High Seas Act, compare *The Culberson,* 61 F. 2d 194 (CA3 1932), with *Moore* v. *The O S Fram,* 226 F. Supp. 816 (SD Tex. 1963), aff'd, *sub nom. Wilhelm Seafoods, Inc.* v. *Moore,* 328 F. 2d 868 (CA5 1964), it is clear that funeral expenses were permitted under the general maritime law prior to *The Harrisburg,* see, *e. g., Hollyday* v. *The David Reeves,* 12 F. Cas. 386 (No. 6,625) (Md. 1879). We therefore find no persuasive reason for not following the earlier admiralty rule and thus hold that funeral expenses are compensable.[28]

Turning now to Sea-Land's double-liability argument, we note that, in contrast to the elements of damages which we today hold may be recovered in a maritime wrongful-death action, the decedent recovered damages only for his loss of past and future wages, pain and suffering, and medical and incidental expenses. Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's

[27] See Speiser § 3.49; Comment, Wrongful Death Damages in North Carolina, 44 N. C. L. Rev. 402, 419–420 (1966).

[28] Funeral expenses have been awarded in post-*Moragne* wrongful-death actions. See, *e. g., Greene* v. *Vantage S. S. Corp.,* 466 F. 2d 159 (CA4 1972); *Dennis* v. *Central Gulf S. S. Corp.,* 323 F. Supp. 943 (ED La. 1971), aff'd, 453 F. 2d 137 (CA5 1972); *Mascuilli* v. *United States,* 343 F. Supp. 439 (ED Pa. 1972); *In re Sincere Navigation Corp.,* 329 F. Supp. 652 (ED La. 1971).

dependents—could not accrue until the decedent's death. Thus, recovery of damages for these losses in the maritime wrongful-death action will not subject Sea-Land to double liability or provide the dependents with a windfall.

There is, however, an apparent overlap between the decedent's recovery for loss of future wages and the dependents' subsequent claim for support.[29] In most instances, the dependents' support will derive, at least in part, from the decedent's wages. But, when a tortfeasor has already fully compensated the decedent, during his lifetime, for his loss of future wages, the tortfeasor should not be required to make further compensation in a subsequent wrongful-death suit for any portion of previously paid wages. Any potential for such double liability can be eliminated by the application of familiar principles of collateral estoppel to preclude a decedent's dependents from attempting to relitigate the issue of the support due from the decedent's future wages.[30]

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[29] The Court of Appeals below recognized the potential problem of double recovery and committed "to the discretion of the trial court the task of making an appropriate deduction from or accommodation of any judgment to which Mrs. Gaudet might otherwise be entitled, to insure that no double recovery results. *Cf.* Billiot v. Sewart, 382 F. 2d 662 (5th Cir. 1967); Prosser, [Law of Torts,] at 934–935," 463 F. 2d, at 1333 n. 1. In our view, application of collateral estoppel principles makes resort to theories of setoff or recoupment generally unnecessary.

[30] If the dependents' total support received from the decedent exceeds the future wages paid to the decedent by the tortfeasor, the dependents will have an actionable cause for support against the tortfeasor for the difference. In that circumstance, if a special verdict was not rendered in the decedent's action specifying the amount of damages awarded for future wages, it may become necessary in the dependents' action to determine what portion of the decedent's lump-sum recovery for his injuries was attributable to future wages. This in no way conflicts with our holding that the dependents will be estopped from relitigating the amount of future

Collateral estoppel applies

> "where the second action between the same parties is upon a different cause or demand . . . . In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac,* [94 U. S. 351,] 353. And see *Russell* v. *Place,* 94 U. S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated." *Commissioner* v. *Sunnen,* 333 U. S., at 597–598.

And while the general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues, see *Blonder-Tongue* v. *University Foundation,* 402 U. S. 313, 320–327 (1971), several exceptions exist. The pertinent exception here is that nonparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties.[31] In such cases, "the bene-

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wages; it is merely an acknowledgment that the amount of the wage recovery in the first action may have to be clarified in the second.

[31] See Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 63–64 (1964); Note, Developments in the Law—

ficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship; they are . . . bound by the rules of collateral estoppel in suits upon different causes of action," F. James, Civil Procedure § 11.28, p. 592 (1965).

Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury*," 2 Harper & James § 24.6, pp. 1293–1294 (emphasis in original).[32] Thus, when a decedent brings his own personal-injury action during his lifetime and recovers damages for his lost wages he acts in a fiduciary capacity to the extent that he represents his dependents' interest in that portion of his prospective earnings which, but for his wrongful death, they had a reasonable expectation of his providing for their support. Since the decedent's recovery of any future wages will normally be dependent upon his fully litigating that issue, we need not fear that applying principles of collateral estoppel to pre-

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Res Judicata, 65 Harv. L. Rev. 818, 855–856 (1952); Restatement of Judgments § 92 (1942) deals expressly with wrongful-death actions and provides that, even in cases where the wrongful-death action is not premised upon the decedent's having an extant cause of action for personal injuries at the time of his death, "the rules of res judicata apply in actions brought after his death as to issues litigated in an action brought by him and terminating in a judgment before his death," *id.*, comment on subsection (1).

[32] This rule appears to have been rejected in England in favor of compensating a personal-injury victim on the basis of his life expectancy *after* the accident. See *Oliver* v. *Ashman*, [1961] 3 W. L. R. 669 (C. A.); Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 600 (1962). Under the English rule, the accident victim is not permitted to recover lost wages for the difference in years between his pre-accident and post-accident life expectancy.

clude the decedent's dependents' claim for a portion of those future wages will deprive the dependents of their day in court.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today rewrites several areas of the admiralty law of wrongful death. In holding that a wrongful-death action may be brought although the decedent has previously recovered in his own suit based on the same wrongful act, the Court disregards a major body of maritime and state law. The majority opinion also opens up an area of sentimental damages that has not been allowed under traditional admiralty doctrine. It hopes to prevent double recovery through a novel application of collateral estoppel principles, which rests in turn on the unprecedented concept that a seriously injured person acts as a fiduciary for an undefined class of potential beneficiaries with regard to his *own* recovery in his *own* personal-injury action. Given the sweep of the majority's approach, the upshot in many areas will be a nearly total nullification of the congressional enactments previously governing maritime wrongful death. Except for a technical joinder of counts to obtain a jury trial and thus to maximize the benefits promised by the Court's opinion, no one entitled to rely on the admiralty doctrine of unseaworthiness will, after today, seek relief under the federal maritime wrongful-death statutes. Several limitations built into those congressional enactments have been swept aside by the majority's decision.

In reaching these results, the majority purports to apply *Moragne* v. *States Marine Lines,* 398 U. S.

375 (1970). It is true that *Moragne* overruled *The Harrisburg*, 119 U. S. 199 (1886), and held that an action for death caused by a violation of maritime duties would lie under the general law of admiralty. But *Moragne* does not support the Court's far-reaching holdings in this case. Indeed, *Moragne*, which was essentially a response to a gap in maritime remedies for deaths occurring in state territorial waters, explicitly counsels against the sort of *tabula rasa* restructuring of the law of admiralty undertaken by the majority. Writing for the Court, Mr. Justice Harlan stressed the need to "assure uniform vindication of federal policies . . . ." 398 U. S., at 401. He eschewed "the fashioning of a whole new body of federal law . . . ," *id.*, at 405, believing that the lower courts would have slight difficulty "in applying accepted maritime law to actions for wrongful death." *Id.*, at 406. He stated that those courts would find "persuasive analogy for guidance" in the accumulated experiences under the state wrongful-death statutes and the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.*, 398 U. S., at 408. He emphasized the consistency of the Court's holding with the congressional purposes behind the Jones Act, 46 U. S. C. § 688. 398 U. S., at 400–402.

The Court has now rejected these guidelines so recently laid down in *Moragne*. Disregarding the source of law endorsed by *Moragne*, as well as the concern for uniformity expressed in that opinion, the Court has fashioned a new substantive right of recovery in conflict with "accepted maritime law" and a new body of law with regard to the elements of damages recoverable in admiralty wrongful-death actions. In my view, these unprecedented extensions of admiralty law exhibit little deference for *stare decisis* or, indeed, for enunciated congressional policy. I also believe these new doctrines are unsound as a matter of principle, will create difficulty

and confusion in the litigation of admiralty cases, and are very likely to result in duplicative recoveries.

I

Long accepted law under the Jones Act,[1] one of the two federal maritime wrongful-death statutes,[2] does not countenance the result reached by the majority today. The Jones Act "created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act [FELA]." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 429 (1958). Since the FELA, 45 U. S. C. §§ 51–60, is the "régime which the Jones Act made applicable to seamen . . . ," [3] the "entire judicially developed doctrine of liability" under the FELA governs a Jones Act case.

[1] 46 U. S. C. § 688. The Jones Act provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Since the Act employs the terms "in the course of his employment . . . ," the cause of action it provides "follows from the seaman's employment status and is not limited to injury or death occurring on the high seas." *Moragne* v. *States Marine Lines*, 398 U. S. 375, 394 (1970). Proof of negligence is a predicate to recovery. *Ibid.*

[2] The second such statute, the Death on the High Seas Act, is discussed below. See text, *infra*, at 599–601 and nn. 4–6.

[3] *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 266 (CA2 1963), cert. denied, 376 U. S. 949 (1964).

Kernan, supra, at 439. An uninterrupted line of FELA and Jones Act cases going back a half century holds that if the decedent reduces his claim to settlement or judgment prior to his death, or otherwise extinguishes his right to pursue the claim, no subsequent wrongful-death action may be brought. See, *e. g., Mellon* v. *Goodyear,* 277 U. S. 335 (1928); *Flynn* v. *New York, N. H. & H. R. Co.,* 283 U. S. 53 (1931); *Walrod* v. *Southern Pacific Co.,* 447 F. 2d 930 (CA9 1971); *Seaboard Air Line R. Co.* v. *Oliver,* 261 F. 1 (CA5 1919); *Gilmore* v. *Southern R. Co.,* 229 F. Supp. 198 (ED La. 1964); *Purvis* v. *Luckenbach S. S. Co.,* 93 F. Supp. 271 (SDNY 1949).

Mellon and its progeny hold unequivocally that a judgment, settlement, or similarly conclusive event with regard to the decedent's own right to seek recovery for his personal injuries "[precludes] any remedy by the personal representative based upon the same wrongful act." *Mellon, supra,* at 344. The Court in *Mellon* quoted with approval the following language from a state court opinion:

> "'"Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed."'" 277 U. S., at 345. (Citation omitted.)

The *Mellon* rule does not rest on a disagreement in principle with the majority's view, *ante,* at 577–578, that a single wrong is capable of producing separate and distinct injuries, those to the decedent and those to his bene-

ficiaries. Indeed, the Court in *Mellon* explicitly recognized that distinction. It noted that although originating in the same wrongful act, there are two separate and distinct claims, one assertable by the injured person and the other upon his death by his personal representative or dependents. 277 U. S., at 340, 342. Nevertheless, *Mellon* and uniformly consistent Jones Act and FELA cases that have followed it hold that when the decedent extinguishes his own claim he simultaneously forecloses any wrongful-death action. As Mr. Justice Holmes put it for a unanimous Court in *Flynn, supra,* the wrongful-death action is "derivative and dependent upon the continuance of a right in the injured employee at the time of his death." 283 U. S., at 56 (citation omitted). Thus, the Court's opinion in this case creates a square conflict with one of the major bodies of maritime law that *Moragne* viewed as a source of guidance.

The Court's implication that the Death on the High Seas Act[4] supports its departure from *Mellon, ante,* at 583 n. 10, is at best conjectural. In fact, no cases addressing the situation presented here appear to have arisen under that Act. Conceivably such a case could arise, because the High Seas Act by its terms covers deaths caused by injuries inflicted at sea, not simply deaths occurring on the high seas. Cf. *Lacey* v. *L. W. Wiggins Airways, Inc.,* 95 F.

[4] 46 U. S. C. § 761 *et seq.* The opening section of the Death on the High Seas Act, 46 U. S. C. § 761, provides:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

Supp. 916 (Mass. 1951).[5] Thus, it would be possible in theory for a person injured at sea to recover for his personal injuries and, following his death, for his survivors to attempt to bring suit under the High Seas Act. But certainly the Act would not be read as allowing the subsequent action. Such a result would conflict with the *Mellon* line of cases under the Jones Act and the FELA, producing precisely the lack of uniformity normally sought to be avoided in admiralty. Moreover, the High Seas Act contains a substitution provision, 46 U. S. C. § 765, that by implication forbids a wrongful-death action following a decedent's judgment. Section 765 provides that if a person who suffers injuries within the scope of the Act dies during the pendency of his own personal injury action, *that* action may be transformed by a personal representative into a wrongful-death action countenanced by the Act.[6] Surely this substitution provision evidences a congressional recog-

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[5] But see *Pickles* v. *F. Leyland & Co.*, 10 F. 2d 371 (Mass. 1925). *Pickles* holds that if the death occurs on land, the High Seas Act is not applicable, even though the injuries ultimately producing death were inflicted at sea. *Id.*, at 372. If this were the correct view, it would be easy to see why cases like the instant one had not previously arisen under the High Seas Act. The Act would simply not allow actions like the present one. However, the Act says "death . . . caused by wrongful act, neglect, or default occurring on the high seas . . . ," not "death occurring on the high seas." See n. 4, *supra*. *Pickles*, therefore, is probably an erroneous reading of the Act.

[6] Section 765 reads:

"If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title [see n. 4, *supra*] during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of [pecuniary losses]."

nition that only one action or the other should be allowed to proceed to judgment.

The Court's reference in *Moragne* to the "strong concern for uniformity" in admiralty law, 398 U. S., at 401, often repeated and often related to congressional policies underlying the Jones Act and the Death on the High Seas Act, *id.*, at 396 n. 12, 401–402, was not an expression of concern solely for intellectual consistency. "Such uniformity not only will further the concerns of both of the . . . Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall. 558, 575 (1875)." 398 U. S., at 401–402. But the lack of uniformity produced by the majority's holding should be evident. For example, whether a seaman's injuries occur on land or at sea will be determinative under the majority's approach. If on land, the seaman will have the Jones Act as his admiralty-related remedy.[7] Under that Act and the *Mellon* line of cases his own personal-injury action will foreclose a subsequent wrongful-death action—a misfortune that would not have befallen him and his survivors if only he had been lucky enough to have been injured at sea. This anomaly is not something, I suspect, the Court will long abide. Since "[i]t has been consistently true in this branch of the law that whatever a seaman can get under one theory he can sooner or later get under all the others . . . ,"[8] the Court's holding undoubtedly portends an express overruling of *Mellon* and its successors, cases that the Court bypasses today.

Aside from the disunity in the law of admiralty inherent in its opinion, I fail to see how the Court can square

[7] See n. 1, *supra*.

[8] G. Gilmore & C. Black, The Law of Admiralty 308 (1957).

its sweeping approach with *Moragne*'s reliance on and admonition to draw by analogy from the federal statutes. *E. g.*, 398 U. S., at 400–402, 408. *Moragne* envisioned a process of accommodation with those statutes, not their abrupt and near-total forced obsolescence. In this regard, it might be noted that the Court has still not resolved many of the practical questions left open in *Moragne*, such as how to define the class of beneficiaries or an appropriate limitation period. Presumably, in resolving such questions the lower courts are to continue to rely on the admiralty wrongful-death statutes. Now they are placed in the interesting position of analogizing to statutes under which the very claim before them would be blocked.

II

The Court in *Moragne* also counseled the lower courts to draw by analogy from the case law under the state wrongful-death statutes. *Id.*, at 408. Under the great majority of those statutes, whether of survival or true death act character, Mrs. Gaudet's cause of action would have been foreclosed by her husband's recovery.[9]

[9] *E. g.*, *Roberts* v. *Union Carbide Corp.*, 415 F. 2d 474 (CA3 1969) (New Jersey law); *Schlavick* v. *Manhattan Brewing Co.*, 103 F. Supp. 744 (ND Ill. 1952) (Indiana law). The cases are reviewed in W. Prosser, The Law of Torts 911–912 (4th ed. 1971) (hereafter Prosser); 2 F. Harper & F. James, The Law of Torts § 24.6 (1956 and Supp. 1968); Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 599, 608–609 (1962) (hereafter Fleming). The latter commentator notes that "[a]t least twenty-three jurisdictions . . . have so held in the clearest terms and some half a dozen more have so indicated in dicta." *Id.*, at 608–609, n. 38. Nine or 10 contrary jurisdictions constitute a "substantial minority view" according to Prosser 912 and nn. 35–39. However, Prosser notes that this view is "largely confined to jurisdictions which do not allow the decedent to recover for his own curtailed life . . . ." *Id.*, at 912. As the Court points out, *ante*, at 593–594, the *Moragne* cause of action is not subject to that limitation.

The Restatement of Torts is also in direct conflict with the position taken by the Court:

> "Although the death statutes create a new cause of action, both they and the survival statutes are dependent upon the rights of the deceased. Hence where no action could have been brought by the deceased had he not been killed, no right of action exists. Likewise a release by the deceased or a judgment either in his favor or, if won on the merits, in favor of the defendant, bars an action after his death. . . ." [10]

Because of the likelihood of double recovery and the threat to repose inherent in the majority's holding, several leading commentators also favor the majority rule under the state wrongful-death statutes.[11] This is

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[10] Restatement of Torts, Explanatory Notes § 925, comment *a*, p. 639 (1939). This position is repeated almost verbatim in the most recent working draft of the second Restatement. See Restatement (Second) of Torts, Explanatory Notes § 925, comment *a*, p. 196 (Tent. Draft No. 19, Mar. 30, 1973). See also Restatement of Torts, Explanatory Notes § 926, comment *a*, p. 646:

"[In those states with statutes combining the functions of a death statute and a survival statute] the representatives of the deceased can recover in a single action both for the damages preceding death and for those caused by the death. Even in such States, however, a judgment obtained by the deceased or a release of the cause of action by him terminates the right of action."

Accord, Restatement (Second) of Torts, Explanatory Notes § 926, comment *a*, p. 204. See also *id.*, Explanatory Notes § 925, comment *i*, p. 199:

"[A] release of his claim by the injured person bars an action after his death for causing the death, as also does a judgment either for, or if on the merits, against him given in an action brought by him for the tort."

[11] *E. g.*, 2 Harper & James, *supra*, at 1293–1294:

"If . . . deceased recovers before his death, his recovery for permanent injuries will be based, under the prevailing American rule, on

particularly true where, as here, the deceased in his own action has recovered his loss of earnings over his pre-accident life expectancy.[12] Even those opposed to the majority position under state law recognize the "force" of that view in such a case.[13]

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his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury.* Presumably any settlement would reflect the legal liability under this rule. The danger of double recovery becomes clear when it is recalled that any benefits of which the survivors were deprived, by the death, would have come out of these very prospective earnings if deceased had lived. At least in the case of serious and apparently permanent injuries, therefore, there is real danger of double recovery if a wrongful death action is allowed after recovery or release by deceased during his lifetime." (Emphasis in original; citations omitted.)

See *id.*, at n. 14: "[Double recovery] is a 'theoretical' as well as a 'practical' danger. . . . The prevailing rules . . . seem therefore to be fully justified." (Citation omitted.) See also Prosser 911: "The courts undoubtedly have been influenced by a fear of double recovery. This is of course possible in point of law, not only under the survival type of death act, but also in any jurisdiction where the decedent would be allowed to recover for the prospective earnings lost through his diminished life expectancy." (Citations omitted.) The latter appears to have been the measure of Mr. Gaudet's recovery in his personal-injury action. 463 F. 2d 1331, 1333 n. 1 (CA5 1972); Tr. of Oral Arg. 20–21.

[12] *E. g.*, Duffey, The Maldistribution of Damages in Wrongful Death, 19 Ohio St. L. J. 264, 273 (1958): In such cases, "[t]he recovery in the wrongful death action based on the decedent's future earning capacity is . . . simply a portion or segment of the larger recovery obtained by the injured person himself in the personal injury action." See n. 11, *supra.*

[13] Fleming 610. "[The fear of duplication of damages] has force . . . whenever allowance was made for prospective loss of earnings [in the decedent's own lawsuit], since this would have drawn on, or depleted, the fund contingently available to satisfy the dependants for loss of their expectancy of support." This commentator also states that the minority of state courts that do not view decedent recovery as a bar to a subsequent wrongful-death action and that

III

The Court devotes a major portion of its opinion to the elements of damages recoverable under *Moragne*. *Ante*, at 584–591. In particular, the Court embraces the Court of Appeals' suggestion, 463 F. 2d 1331, 1333 (CA5 1972), that Mrs. Gaudet is entitled to seek damages for loss of "society," including love, affection, care, attention, companionship, comfort, and protection. *Ante*, at 585–590. Although I would not otherwise address the question of damages because I believe that no cause of action exists here, I think it important to note that the Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purposes expressed in the two federal maritime wrongful-death statutes.[14] The traditional admiralty view is that such nonpecuniary damages are not recoverable under the Death on the High Seas Act and the Jones Act.

The Death on the High Seas Act by its terms restricts recovery to pecuniary losses,[15] a restriction the lower

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are "content with the bland assertion that no duplication of damages can arise because the release or recovery by the decedent *could not* have covered the period beyond his death . . ." are relying on a "protestation of faith rather than a conclusion drawn from proven facts . . . ." *Id.*, at 615 (emphasis in original).

[14] I do not address the correctness of the Court's holding that *Moragne* allows the recovery of loss of services, see, *e. g.*, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 71, 73 (1913), or funeral expenses. Compare *Cities Service Oil Co.* v. *Launey*, 403 F. 2d 537, 540 (CA5 1968), with *Greene* v. *Vantage S. S. Corp.*, 466 F. 2d 159, 167 (CA4 1972).

[15] 46 U. S. C. § 762. Section 762 provides:

"The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."

federal courts have consistently read as excluding loss of consortium and similar nonpecuniary injuries to personal relationship, affections, and sentiments.[16] Because of its relationship to the FELA and its overlapping coverage with the Death on the High Seas Act, the Jones Act also has been read as forbidding recovery of the sentimental losses approved by the Court today.[17] Moreover, these well-established damages principles under the two federal maritime wrongful-death statutes, coupled with a concern for uniformity in admiralty law, have led most lower courts that have taken part in the continuing development of the *Moragne* cause of action to conclude that the affection-related damages endorsed by the Court are not recoverable under *Moragne*.[18] These courts have

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[16] *E. g., Igneri* v. *Cie. de Transports Oceaniques,* 323 F. 2d, at 266 n. 21; *Middleton* v. *Luckenbach S. S. Co.,* 70 F. 2d 326, 330 (CA2), cert. denied, 293 U. S. 577 (1934). See *Dugas* v. *National Aircraft Corp.,* 438 F. 2d 1386, 1392 (CA3 1971) ("The amount of recovery under the Death on the High Seas Act is determined by the actual pecuniary loss sustained by the beneficiary due to the wrongful death").

[17] *E. g., Igneri* v. *Cie. de Transports Oceaniques, supra,* at 266 ("[I]t is established . . . that the damages recoverable by a seaman's widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium"). Cf. *Cities Service Oil Co.* v. *Launey, supra,* at 540. See *Gulf, C. & S. F. R. Co.* v. *McGinnis,* 228 U. S. 173, 175 (1913); *Michigan C. R. Co.* v. *Vreeland, supra,* at 68, 70–71; G. Gilmore & C. Black, The Law of Admiralty 306 (1957): "Recovery under the High Seas Act like that under FELA § 51 [and thus the Jones Act] is based on pecuniary loss to the beneficiaries as a result of the wrongful death. The damage calculation therefore involves an estimate of what the decedent's life expectancy would have been, his probable earnings during that period and the amounts he would have contributed to beneficiaries."

[18] *E. g., Simpson* v. *Knutsen,* 444 F. 2d 523 (CA9 1971); *Petition of United States Steel Corp.,* 436 F. 2d 1256, 1279 (CA6 1970), cert. denied, 402 U. S. 987 (1971); *In re Cambria S. S. Co.,* 353 F. Supp. 691, 697–698 (ND Ohio 1973); *Green* v. *Ross,* 338 F. Supp.

heeded *Moragne*'s admonition not to fashion a whole new body of law, yet their holdings are disapproved by the majority. *Ante,* at 588 n. 23.

IV

The reasons underlying the extensive state and admiralty precedent contrary to the Court's holding that this action may be brought are not difficult to discern. The majority's statement that this precedent rests not so much on policy as on "statutory limitations on the wrongful-death action . . . ," *ante,* at 579, is erroneous.[19] The

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365, 367 (SD Fla. 1972); *Petition of Canal Barge Co.,* 323 F. Supp. 805, 820–821 (ND Miss. 1971). The state courts of Louisiana, the State where Mr. Gaudet's injuries occurred, have reached the same result. *Strickland* v. *Nutt,* 264 So. 2d 317, 322 (La. App.), aff'd *sub nom. DeRouen* v. *Nutt,* 262 La. 1123, 266 So. 2d 432 (1972). ("The *Moragne* case, with the desire for uniformity in maritime death actions announced therein, precludes loss of love and affection as an element of damage here.")

Only one Fifth Circuit case, other than the instant case, and two cases from the United States District Court for the Eastern District of Louisiana have concluded that *Moragne* signaled a break with settled admiralty wrongful-death damages rules. *Dennis* v. *Central Gulf S. S. Corp.,* 453 F. 2d 137, cert. denied, 409 U. S. 948 (1972); *In re Farrell Lines, Inc.,* 339 F. Supp. 91 (1971); *In re Sincere Navigation Corp.,* 329 F. Supp. 652 (1971). In the latter case, the court candidly admitted that its decision "may conflict with *Moragne*'s goal of uniformity of recovery for all who perish on navigable waters." *Id.,* at 657.

[19] The majority's opinion, apparently in an effort to avoid the force of precedent contrary to its view, contrasts disparagingly these statutes with the more "humane" judge-made rule of *Moragne. Ante,* at 581–583. But the majority ignores the extent to which the Court in *Moragne* expressly identified its holding with the policy and principles of the very statutes now criticized:

"The policy thus established [by the state and federal wrongful-death statutes] has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction

large number of courts that have refused to adopt the majority's view have done so for very good, practical reasons. The Court has adopted a rule that will be difficult to administer, that presents a serious risk of unfairness for those in petitioner's position, and that fails to foster the law's normal regard for finality.

The majority's position requires it to establish procedures to prevent a double recovery of the elements of damages awarded Gaudet in his own lawsuit. This is no easy task, as "[i]t should be obvious that as yet no satisfactory systematic solution to the whole [double recovery] problem has been found." [20] The Court adopts a collateral estoppel theory, and apparently would implement this by treating the injured seaman as a "fiduciary" for his dependents. *Ante*, at 593–594. Apart from the utter novelty of this extension of the law of trusts and fiduciary duties, the majority's estoppel theory is hardly a "satisfactory solution" to the problem of unfair recoveries.[21] Apparently the Court intends to limit the ele-

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but also in those of decisional law." 398 U. S., at 390–391. And, again:

"Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." *Id.*, at 408.

Contrary to the Court's intimations, there is no basis for suggesting a tension between these statutes and *Moragne*. Indeed, it is clear from the *Moragne* opinion that the Court relied upon the statutes in its analysis, sought only to fill a narrow gap in the law left by them, and considered that the statutes afforded "persuasive analogy for guidance" in developing the *Moragne* cause of action. *Ibid.*

[20] Prosser 912 (footnote omitted).

[21] The theory probably creates more problems than it resolves. What are the boundaries of the class of potential beneficiaries who are estopped to relitigate loss of support? If a seriously injured person is the fiduciary for an undefined class of potential beneficiaries, may he be enjoined from wasting his assets or disinheriting members

ments of proof of damages that may be introduced at the second trial. But this will in no way guarantee that the second trier of fact will succeed in compartmentalizing the allowable from the unallowable elements of damages in the second trial. The highly conceptualized nature of the parsing of categories of damages undertaken by the Court suggests how unlikely it is that the majority's theoretical distinctions will be meaningful in practice. And control by way of appellate review of the injustices that are bound to occur will be, practically speaking, an impossible task.

Mr. Gaudet's judgment was given by a jury. It would be unrealistic to assume that that verdict was restricted to an objective measurement of Gaudet's lost earnings plus the "value" of his pain and suffering. In all likelihood, Gaudet's award reflected an element of the jury's concern for a permanently disabled working man. As anyone who has tried jury cases knows, jury sympathy commonly overcomes a theoretical inability to recover for such intangibles as loss of society. If Mrs. Gaudet is then allowed to recover in her subsequent lawsuit the full value, whatever that is, of her loss of love, attention, care, affection, companionship, comfort, and protection, she will be given a second opportunity to benefit from the imprecision built into any award for injuries that cannot be measured objectively. The Gaudet family may well then receive substantially more than just compensation for its injuries.

One expression of jury sympathy is commonplace, despite its conflict with the damages principles that in theory control. But certainly two opportunities for

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of his family? There will also be some nice questions under the majority's approach about whether a particular item of proof at the second trial is to be introduced with regard to the forbidden issue of support or the permissible issue of, say, services.

jury sentiment cross the line between benignity and bonanza and should not be sanctioned. And, it is in those cases where the decedent's suit and the subsequent *Moragne* wrongful-death action are both tried to juries that the majority's procedures for preventing a windfall are most likely to break down. Since it is an admiralty action, a *Moragne* claim by itself will not entitle the wrongful-death claimant to a jury. But there will be cases in which the claimant will be able to join a state law action to a *Moragne* claim and obtain a jury for both, either in state or federal court. See, *ante,* at 589 n. 24. When that happens, those in petitioner's position will be subjected twice to the vagaries of a jury, the second time on such wide-open damages concepts as those embraced by the majority.

The Court's approval of a second recovery based on the same wrong for which decedent already had recovered, compounded by its rejection of traditional admiralty "pecuniary loss" damage standards, seems particularly inappropriate given the nature of the claim relied on by both Gaudets. The maritime concept of unseaworthiness is not based on fault. The doctrine has evolved into a judicially created form of strict liability.[22] When the law imposes absolute liability, it often restricts recovery to damages for those injuries that are clearly ascertainable and susceptible of monetary compensation. *E. g., Igneri* v. *Cie. de Transports Oceaniques,* 323 F. 2d 257, 268 (CA2 1963), cert. denied, 376 U. S. 949 (1964). This reflects the impossibility of deterrence and the inappropriateness of punishment in many cases where liability is absolute. The Court has broken with that wise rule of social policy in this case.

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[22] *Moragne* v. *States Marine Lines,* 398 U. S., at 399. Cf., Comment, Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411 n. 4 (1971).

The Court also has ignored the law's normal regard for an end to duplicative litigation arising from the same transaction. After her husband's judgment was affirmed on appeal,[23] Mrs. Gaudet commenced this action by, in essence, changing a few lines in her husband's complaint and filing it again in the same United States District Court as a *Moragne* wrongful-death action. That court's dismissal of Mrs. Gaudet's complaint on *res judicata* grounds [24] is hardly surprising, given the striking similarities between the two Gaudet complaints. Both complaints were based on the maritime doctrine of unseaworthiness, a condition that Mrs. Gaudet alleged was established as a matter of *res judicata* by Mr. Gaudet's successful lawsuit. App. 2, 5–6. The same facts and injuries were alleged. *Id.*, at 1–2, 4–5. Both sought recovery, in the amount of $250,000. *Id.*, at 2, 6. Whereas Mr. Gaudet had sought recovery for lost earnings, *id.*, at 2, Mrs. Gaudet sought compensation for her "severe financial loss." *Id.*, at 5. Thus, on the face of the complaints, Mrs. Gaudet apparently sought recovery solely for elements of damages that had been encompassed by her husband's judgment.[25]

There should be strong reasons of policy to justify such repetitive suits and to impose on petitioner the attendant doubling of litigation expenses. The reasons advanced by the majority opinion do not, in my view, approach that level of persuasion. Petitioner has already fully litigated, and paid, a large judgment com-

[23] *Stein* v. *Sea-Land Services, Inc.*, 440 F. 2d 1181 (CA5 1971). It might be noted that because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally.

[24] Pet. for Cert. 17.

[25] Although the majority fails to address the point, presumably its result means that Mrs. Gaudet must at least amend her complaint upon remand to the District Court.

pensating Gaudet's estate for the injuries Gaudet incurred on board its vessel. Ordinarily, petitioner would have been able to consider the case closed and to order its affairs on the basis of a verdict affirmed on appeal. Today's result deprives petitioner of that reliance interest, subjecting it to another round of litigation with wide-open damages possibilities. The admiralty precedents, the prevailing weight of state law, and elementary fairness call for relieving petitioner of that unjustifiable burden.

As noted at the outset of this dissent, the Court has written new admiralty law as to the right of survivors to recover for wrongful death and has expanded significantly the elements of damages recoverable. In reaching these results, the majority opinion has discredited, if not in substance overruled, the unanimous decisions of the Court in the *Mellon* and *Flynn* cases. In *Moragne,* a decision on which I believe the majority places a mistaken reliance, the Court emphasized its reluctance to disregard or overrule established precedent:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors." 398 U. S., at 403.

Mr. Justice Harlan, for the Court, then went on to state with care the reasons for rejecting *The Harrisburg*

rule, described as an "unjustifiable anomaly." *Id.*, at 404. The substantive rule rejected today is no comparable anomaly. It has been the generally applied doctrine since wrongful-death actions were introduced in this country. It has been the rule of the relevant federal statutes since their inception, and Congress has not modified the rule during that entire period. It was the rule announced in *Mellon* and *Flynn, supra,* cases the Court chooses not to follow today. And, unlike the opinion in *Moragne,* the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule.

CHRISTIAN ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR, DIVISION OF EMPLOYMENT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72–5704. Argued November 13, 1973—Decided January 21, 1974

Appellants, former federal probationary employees who were denied benefits under the Unemployment Compensation for Federal Employees Program, brought this action in District Court seeking declaratory and injunctive relief against provisions of the Program and its implementing regulations that they contended operated to deny them a hearing on the factual basis for their removal from federal service, for the purpose of determining their eligibility under state law for unemployment compensation. They claimed that the Act requires such a hearing and, alternatively, that the denial of a hearing deprived them of due process and equal protection. A three-judge District Court held that the statute does not require a hearing to contest the employing agency's findings; dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction; and held that the state agency's denial of a hearing did not violate the Due Process or Equal Protection Clauses. *Held:* Any decision upon appellants' statutory or constitutional claims would be premature in view of the fact that the record does not disclose that the state agency, in notifying appellants of the adverse determinations, informed them, as it was required to do by the applicable regulation, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies; or that appellants invoked the available procedure entitling them to request their agencies "to reconsider and correct" those findings. The District Court's dismissal of the suit as to both federal and state defendants is therefore vacated with directions that the court determine whether appellants should be permitted to invoke the applicable administrative procedures. Pp. 618–624.

347 F. Supp. 1158, vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

E. Richard Larson argued the cause for appellants. With him on the briefs were *Dennis R. Yeager* and *Robert P. Roberts.*

Mark L. Evans argued the cause for appellees. On the brief for the federal appellees were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Keith A. Jones,* and *Kathryn H. Baldwin. Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Brenda Soloff,* Assistant Attorney General, filed a brief for appellees New York State Department of Labor et al.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants, discharged federal probationary employees, were denied unemployment compensation by the New York State Department of Labor, an "agent of the United States" under agreement with the Secretary of Labor for the administration of the Unemployment Compensation for Federal Employees (UCFE) Program, 5 U. S. C. § 8501 *et seq.* Appellants brought this class suit against that state agency in the District Court for the Southern District of New York, joining as defendants the United States Department of Labor, which is charged with overall responsibility for the program, and the United States Post Office Department and Department of the Treasury, which are appellants' former employing agencies.

Appellants alleged that the state agency had based its adverse determinations on findings of fact made *ex parte* by the federal employing agencies, and that the state agency had refused to afford either appellant a hear-

**Mozart G. Ratner, George B. Driesen, Leo M. Pellerzi,* and *George Kaufmann* filed a brief for the National Association of Letter Carriers AFL–CIO et al. as *amici curiae* urging reversal.

ing at which he or she could attempt to contest those federal findings. The result, appellants claimed, was a deprivation of any opportunity to be heard, in violation of the UCFE statutes and of the Fifth and Fourteenth Amendments. They sought certification as representatives of the class of persons similarly situated, the convening of a three-judge court, and declaratory, injunctive, and mandamus relief.

The District Court viewed the suit as a constitutional attack on 5 U. S. C. § 8506 (a),[1] which, *inter alia*, makes the findings of the federal employing agency "final and conclusive" on the state agency, and on the regulations of the Secretary of Labor promulgated, pursuant to 5 U. S. C. § 8508, to enforce the program.[2] A three-judge

[1] That subsection provides:

"(a) Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—

"(1) whether or not the Federal employee has performed Federal service;

"(2) the periods of Federal service;

"(3) the amount of Federal wages; and

"(4) the reasons for termination of Federal service.

"The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502 (d) and 8503 (c) of this title. This subsection does not apply with respect to Federal service and Federal wages covered by subchapter II of this chapter."

[2] The pertinent sections of 20 CFR appear in the Appendix to this opinion.

court was convened. That court, in an opinion reported at 347 F. Supp. 1158 (1972), first examined the statutory claim and held that § 8506 (a) does not require that appellants receive either a state or a federal hearing to contest the employing agency's findings. Next, the court noted that jurisdiction over the claims against the federal defendants had been alleged only under 28 U. S. C. § 1361, providing for mandamus actions. Holding that § 1361 will not support a constitutional challenge to a statute, the court dismissed the constitutional claims against the federal defendants for lack of subject-matter jurisdiction.[3] Finally, turning to the constitutional claims against the state defendants, the court, apparently assuming for purposes of argument that the federal defendants were not constitutionally required to afford appellants a hearing, treated the claims as asserting that

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[3] The District Court stated no reasons to support this holding. Appellants attack it, arguing that mandamus jurisdiction lies where the act of a federal official, although authorized by statute, is alleged to violate the Constitution, citing *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249 (1908). Alternatively, they contend that jurisdiction over the federal defendants lies under 28 U. S. C. § 1343 (3) so long as there has been joint participation by state and federal officers under color of state law, see *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). At oral argument the Assistant to the Solicitor General stated: "[W]e do not contest jurisdiction under [the] mandamus statute." Tr. of Oral Arg. 26. See also Brief for Federal Appellees 6 n. 2.

We have no occasion to address appellants' contentions that the District Court has jurisdiction to hear the constitutional claims against the federal defendants. There is jurisdiction of the federal defendants in any event for purposes of consideration of the appellants' statutory claim that the Secretary has disobeyed a nondiscretionary command in § 8506 that he provide for a full hearing. See *infra*, at 621–622. Our remand directs that the District Court reconsider that claim as related to the availability under the Secretary's regulations of a right of reconsideration and correction of the findings of the employing agencies.

denial of a state hearing was, in effect, a denial of any hearing on the federal findings. The court held that the denial of a hearing by the state agency did not violate either the Due Process or the Equal Protection Clause.

We noted probable jurisdiction of appellants' appeal, 411 U. S. 930 (1973). We are of the view that decision upon appellants' statutory and constitutional claims would be premature. We cannot discover in the record that the state agency, in notifying appellants of the adverse determinations, informed them, as required by 20 CFR § 609.20, of their "right to additional information or reconsideration and correction" of the findings by the employing agencies. Nor can we discover from the record whether or not appellants invoked 20 CFR § 609.23, entitling them to request their employing agencies "to reconsider and correct" those findings.

The "findings" of appellant Christian's federal employer, the United States Post Office Department, were that Christian was discharged because of excessive absences. The "findings" of appellant Green's employer, the Department of the Treasury, were that Green was discharged for consuming an alcoholic beverage within 24 hours of going on duty as a sky marshal. It is clear that neither was afforded a prior hearing by his or her agency or any opportunity to challenge the justifications for discharge.[4] Each then applied for unemployment compensation through the New York State Department of Labor. As required by § 8506, New York requested and obtained

[4] Appellant Green unsuccessfully sought review of the factual basis for his discharge by the Civil Service Commission under 5 CFR § 315.806. But, as provided by that regulation, a probationary federal employee has no right to appeal a discharge, and is only entitled to a hearing on the basis of claims that the discharge resulted from discrimination based on race, color, religion, sex, political persuasion, marital status, or physical handicap, or that the procedure used violated 5 CFR § 315.805.

from each agency its "findings" describing the nature of the employment, including the reasons for the discharge. On the basis of those findings, the state officials made an initial determination that neither appellant qualified for compensation under the applicable state standards.[5]

We find nothing whatever in the record to show compliance by the state agency with 20 CFR § 609.20. All that appears is that the New York officials sent each appellant a letter that included (a) a recitation that no employment benefits could be paid, (b) the state rule that required that conclusion, (c) a short summary of the findings of the federal agency, and (d) a statement that the individual could request a hearing before an impartial state referee. Indeed, the letter appears to be a form letter appropriate in cases of private and state employee applicants, but not tailored for the situation of the federal employee applicant given rights of reconsideration and correction by the Secretary's regulations.

Appellant Christian requested and obtained a hearing

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[5] Section 8502, 5 U. S. C., provides in part:

"(b) The agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State if his Federal service and Federal wages assigned under section 8504 of this title to the State had been included as employment and wages under that State law.

. . . . . .

"(d) A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

See 20 CFR § 609.14; N. Y. Labor Law § 500 *et seq.* (1965). Both appellants were denied compensation on the basis of § 593, which includes as grounds for denial "voluntary separation without good cause" and "misconduct in connection with his employment."

before a state referee. The referee permitted her to introduce evidence to rebut the federal findings, credited that evidence, and recommended that she be provided unemployment compensation. The state Appeals Board, however, reversed on the ground that § 8506 prohibited re-examination of the facts found by the federal agency. Appellant Green had not obtained a hearing at the time this suit was filed, and the record does not disclose whether he requested one.[6]

The UCFE Program does not, as the state Appeals Board recognized, contemplate a hearing before the state agency for correction of factual findings of the federal employer. But, while prohibiting state re-examination of the facts, § 8506 (a) also requires an opportunity for federal re-examination:

> "The regulations [promulgated by the Secretary of Labor] shall include provision for correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of [state adjudication]."

The regulations promulgated by the Secretary of Labor plainly attach great significance to the right of the discharged employee to have the employing agency reconsider its stated reasons for his discharge. The crucial requirement that triggers this reconsideration is the obligation imposed upon the state agency to notify the applicant of the content of the federal findings, which notice "shall [also] inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings." 20 CFR § 609.20. Thereupon, the employee may obtain additional infor-

[6] Both appellants were entitled to a hearing, N. Y. Labor Law § 620, review by the Appeals Board, *id.*, § 621, and state judicial review on questions of law, *id.*, § 624.

mation from the employing agency concerning the basis of its findings, § 609.22. Whether or not he avails himself of that opportunity, he may file a request for reconsideration and correction, "together with such information as supports his request, through the State agency before which the claim is pending . . . ." § 609.23. Upon receipt of such a request, the federal agency must consider any information submitted by the employee, promptly correct any errors or omissions, and either affirm, modify, or reverse its original findings in writing. § 609.9. Finally, the State is required to stay its adjudicatory process pending federal reconsideration, although it is conclusively bound by any factual findings of the federal agency, §§ 609.23 (a), 609.18 (c), when it applies its own law to redetermine eligibility. §§ 609.24 (c), (d).

Appellants' contention that § 8506 (a) works a denial of due process and equal protection by depriving them of a hearing before the state agency is thus misdirected. Congress has precluded a hearing on the federal findings in any state forum, but it has required the Secretary of Labor to provide a "hearing" of some dimensions in conjunction with the mandated procedures for reconsideration. Whether a more comprehensive hearing than §§ 609.22–609.24 of the regulations now provide is required either by the language of § 8506 (a) or by the Constitution—and we intimate no views on those questions—the regulations of the Department of Labor, as implemented by the federal agencies subject to those regulations, should be the focal point of the inquiry.[7]

[7] We note that an employee who resigns must, pursuant to 20 CFR § 609.18, be "afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation," if the federal findings are to be final and conclusive. The Solicitor General argues that there are sound reasons for limiting such opportunities to resignees since the agency "will have no information

The absence of any indication in the record that this federal administrative procedure was followed is, in our view, a bar to our consideration of appellants' attack upon the validity of the regulations. It is true that the fact that the employing agency's decision is not statutorily subject to judicial review does not preclude review of the agency's procedure used to reach that determination. See *Cole* v. *Young*, 351 U. S. 536 (1956); L. Jaffe, Judicial Control of Administrative Action 371–372 (1965). But there are sound practical reasons for declining such review where the agency has not had the opportunity to apply its challenged procedure to a determination that is clearly within its subject-matter jurisdiction.

The most obvious reasons relate to economy. A favorable agency decision on the merits of the claim may moot the objections to the procedure employed. And "it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages," *McKart* v. *United States*, 395 U. S. 185, 194 (1969).

But there are also persuasive reasons more directly related to the presentation of the procedural claim, as we have noted in cases involving the analogous requirement that administrative remedies be exhausted prior to application for judicial review of the merits. See *McGee* v. *United States*, 402 U. S. 479 (1971); *Rosado* v. *Wyman*, 397 U. S. 397, 406–407 (1970). Appellants' criticism, on this appeal, of the federal administrative remedy as an *"ex parte"* determination amply demonstrates the point. The regulations clearly require that the agency

concerning [their] reasons." Brief for Federal Appellees 28. At this stage of the litigation, however, we have no way of knowing what protections this procedure includes, how it differs from the procedures available to discharged employees, or what kinds of "resignations" it will cover.

receive and consider any additional information the employee submits. Thus, the question is not whether there is to be some form of adversary proceeding, but whether that proceeding must be as elaborate as appellants contend.[8] That determination would be hazardous on the scant record before us. The regulations appear capable of accommodating various kinds of issues, and their requirements should be construed with an eye to the nature of the agencies involved and the employment relationship. We cannot know at this stage what particular procedures will be applied, whether credibility determinations will arise, how they will be treated if they do, or even what official within a federal employing agency will be responsible for the reconsideration. Removal of these uncertainties from the case may significantly advance judicial resolution of appellants' claims, while occasioning no great cost to them.[9]

But we cannot determine on this record whether the District Court would have dismissed this suit for failure to invoke the federal administrative procedures. The adverse notification provided by New York clearly fails to satisfy the notice requirement of 20 CFR § 609.20 of the Secretary's regulations. Without that crucial information concerning their rights, appellants could hardly be found to have waived them by proceeding in the state forum.[10] Yet the record is silent concerning whether

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[8] "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

See *Morrissey* v. *Brewer*, 408 U. S. 471 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971).

[9] Cf. *McKart* v. *United States*, 395 U. S. 185, 196–197 (1969).

[10] At oral argument the Assistant to the Solicitor General suggested that appellants might now be barred from obtaining reconsideration

such information was provided, either with the state notice or otherwise. Under the circumstances, we vacate the District Court's dismissal of the suit as to both federal and state defendants and remand to the District Court with directions to determine whether appellants should be permitted to invoke the federal procedures. In such case, the suit should be retained on the docket for final decision following the federal redetermination proceedings.

So ordered.

APPENDIX TO OPINION OF THE COURT

Code of Federal Regulations
Title 20: Employees' Benefits
Part 609—Unemployment Compensation for Federal Civilian Employees

§ 609.1 Definitions.

. . . . .

(b) "Federal agency" means any department, agency, or governmental body of the United States, including

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and correction of the findings by the passage of time. We find no such limitation in the regulations. Indeed, the only time limitation imposed with regard to corrections is to be found in 20 CFR § 609.7, which requires the federal employing agency to "promptly correct its error" if it ascertains within one year of its initial submission of findings to the State that "any of its Federal findings were erroneous." That this is an independent obligation, imposed on the agency without regard to the receipt of a request for reconsideration by the employee, is clear both from the language of the regulation and from the fact that all other time limits imposed by the regulations are designed to protect the employee from delay by the agency. See, *e. g.*, 20 CFR §§ 609.6, 609.19 (b). Compare *id.*, § 609.24 (a), with *id.*, § 609.24 (d). Moreover, a construction of the regulation as barring reconsideration and correction despite the State's failure to provide the notice required by the regulations might raise independent constitutional problems.

any instrumentality wholly or partially owned by the United States, employing individuals in Federal civilian service.

. . . . .

(f) "Federal findings" means the facts found by a Federal agency as to (1) whether an individual has performed Federal civilian service for such agency during the base period specified on a Form ES–931; (2) the period or periods of such Federal civilian service; (3) the individual's Federal civilian wages for the base period specified on such form; and (4) the reasons for termination of his Federal civilian service.

. . . . .

§ 609.6 Federal findings on Form ES–931.

(a) Within 4 work days after receipt from a State agency or the Secretary of a Form ES–931 a Federal agency shall make its Federal findings, complete all copies of the form, and transmit its Federal findings to the State agency or the Secretary, as appropriate, on such form or as a part thereof. If documents necessary for completion of a Form ES–931 have been assigned to an agency records center or the Federal Records Center in St. Louis the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such request.

(b) If a completed Form ES–931 cannot be returned within 4 work days of receipt the Federal agency immediately shall inform the State agency or the Secretary, as appropriate, and shall include an estimated date by which the completed form will be returned.

(c) Each Federal agency shall maintain a control of the Forms ES–931 received by it that will enable it to ascertain at any time the number of such forms that have not been returned to the requesting State agency

or the Secretary and the date of the Federal agency's receipt of such unreturned forms.

§ 609.7 Corrected Federal findings.

If a Federal agency ascertains at any time within 1 year after it has returned a completed Form ES-981 [*sic*] to a State agency or the Secretary that any of its Federal findings were erroneous it shall promptly correct its error and forward corrected Federal findings to the State agency or the Secretary, as appropriate.

§ 609.8 Answering requests for additional information.

On receipt of a request for additional information under § 609.22 a Federal agency except where it would be inconsistent with general policies followed in the case of separations for security reasons shall furnish in writing to the requesting authority such additional information as (1) will enable a Federal civilian employee to understand the basis for Federal findings or (2) will enable the requesting authority to correctly apply a State unemployment compensation law.

§ 609.9 Answering requests for correction of Federal findings.

On receipt of a request for reconsideration and correction of Federal findings under § 609.23 a Federal agency shall consider the information supplied in connection with such request and shall review its Federal findings. The Federal agency promptly shall correct any errors or omissions in its Federal findings and shall affirm, modify, or reverse any or all of its Federal findings in writing. The Federal agency then shall forward its reconsidered Federal findings to the requesting authority.

. . . . .

§ 609.18 Finality of Federal findings.

(a) Federal findings under § 609.6 or § 609.7 shall be final and conclusive except that Federal findings which contradict the reasons given by a Federal civilian employee for his resignation or which relate to the validity of such reasons shall not be final and conclusive unless such employee has been afforded an opportunity for a fair hearing on any issue involved in the alleged reasons for resignation. Such opportunity for hearing may be afforded by the Federal agency or the U. S. Civil Service Commission at any appropriate stage with respect to any personnel action, or upon request for reconsideration under § 609.23.

(b) Additional information submitted by a Federal agency under § 609.8 shall be considered part of the original Federal findings which, as so supplemented, shall be final and conclusive, as provided in paragraph (a) of this section.

(c) Federal findings which after reconsideration under § 609.9 have been affirmed, modified, or reversed by the Federal agency shall be final and conclusive, as provided in paragraph (a) of this section.

§ 609.19 Determination of entitlement.

(a) *Entitlement.* The State agency of a State whose unemployment compensation law applies to a Federal civilian employee under § 609.15 promptly shall determine such employee's entitlement to compensation and pay such compensation in the same amounts, on the same terms, and subject to the same conditions as would apply to such employee if his Federal civilian service and wages had been included as employment and wages under the State unemployment compensation law except that § 609.31 shall apply to the Virgin Islands agency in lieu of this paragraph.

(b) *Determination in absence of Form ES–931.* (1) If a Form ES–931 has not been received from a Federal agency by the 12th day after such form was forwarded to such agency, a State agency shall determine entitlement to compensation on the basis of a Federal civilian employee's statement under oath if in addition to furnishing such statement such employee submits for examination any document issued by a Federal agency (as for example Standard Form 50 or W–2) showing that he performed service for such agency.

(2) If a Form ES–931 received from a Federal agency after such determination contains Federal findings which would result in a change in the Federal civilian employee's entitlement to compensation the State agency promptly shall make a redetermination and give such employee notice thereof. All payments of compensation made after such redetermination shall be in accordance therewith and all payments of compensation made prior to such determination shall be adjusted in accordance therewith. If the Federal civilian employee has received compensation not in accordance with the redetermination § 609.21 shall apply.

§ 609.20 Notice of determination.

A notice of determination or redetermination shall be given to a Federal civilian employee with respect to any determination or redetermination under § 609.19 or § 609.31. Such notice shall be given in the same manner as notice of determination or redetermination is given to claimants under the State unemployment compensation law. The notice shall include the Federal findings and shall inform the Federal civilian employee of his right to additional information or reconsideration and correction of such findings. The State agency shall set forth the Federal findings in

sufficient detail to enable the Federal civilian employee to determine whether he wishes to request reconsideration or correction of any such findings.

. . . . .

§ 609.22 Procedure for obtaining additional information.

(a) *Request by Federal civilian employee.* If a Federal civilian employee needs additional information in order to understand the basis for a Federal finding in connection with a claim for compensation under the UCFE program he may file a request through the State agency, or the Secretary if the State agency does not determine claims under the UCFE program, for more specific information from the Federal agency which made such Federal finding. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for additional information is filed, such employee must file concurrently with such request a timely appeal or request for redetermination under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency the additional information requested.

(b) *Request by State agency.* If at any stage of determining a Federal civilian employee's entitlement to compensation a State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary determines that Federal findings do not contain sufficient information to enable correct application of the State unemployment compensation law a request may be made for additional facts from the appropriate Federal agency.

§ 609.23 Procedure for obtaining correction of Federal findings.

(a) *Request by Federal civilian employee.* A Federal civilian employee who wishes a Federal agency to reconsider and correct Federal findings in connection with a claim for compensation under the UCFE program may file a request for such reconsideration and correction, together with such information as supports his request, through the State agency before which the claim is pending or through the Secretary if the State agency does not determine claims under the UCFE program. Such request shall be mailed by the State agency or the Secretary to the appropriate Federal agency. If notice of a determination of entitlement has been given to the Federal civilian employee before a request for reconsideration and correction of Federal findings is filed, such employee must file concurrently with such request a timely appeal under the State unemployment compensation law. No hearing on such appeal shall be scheduled before the State agency receives from the Federal agency its reconsidered Federal findings.

(b) *Request by State agency.* A State agency, State administrative appeal authority (including the referee in the Virgin Islands), or the Secretary may request a Federal agency to reconsider and correct its Federal findings at any stage in determining a Federal civilian employee's entitlement to compensation.

§ 609.24 Procedure after correction of Federal findings.

(a) A State agency shall forward to the affected Federal civilian employee a copy of reconsidered Federal findings or additional information furnished by a Federal agency.

(b) If additional information or reconsidered Federal findings provide a basis under the State un-

employment compensation law for the State agency to redetermine such employee's entitlement to compensation the State agency promptly shall make a redetermination and give notice thereof to the affected Federal civilian employee.

(c) If a State agency after reviewing additional information or reconsidered Federal findings submitted by a Federal agency does not consider that there is a basis for making a redetermination the State agency promptly shall set a date for hearing the Federal civilian employee's appeal.

(d) If Federal findings are corrected under § 609.7 a State agency shall notify the affected Federal civilian employee of such correction. If the State unemployment compensation law permits and the corrected Federal findings afford a basis for such action the State agency shall redetermine such employee's entitlement to compensation and give notice of redetermination to such employee.

§ 609.25 Appeal by Federal civilian employee.

(a) A determination or redetermination by a State agency as to a Federal civilian employee's entitlement to compensation is subject to review, except for Federal findings which are final and conclusive under § 609.18, in the same manner and to the same extent as other determinations of entitlement under the State unemployment compensation law.

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CLEVELAND BOARD OF EDUCATION ET AL. *v.* LaFLEUR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72–777. Argued October 15, 1973—Decided January 21, 1974*

Pregnant public school teachers brought these actions under 42 U. S. C. § 1983 challenging the constitutionality of mandatory maternity leave rules of the Cleveland, Ohio (No. 72–777), and Chesterfield County, Virginia (No. 72–1129), School Boards. The Cleveland rule requires a pregnant school teacher to take unpaid maternity leave five months before the expected childbirth, with leave application to be made at least two weeks before her departure. Eligibility to return to work is not accorded until the next regular semester after her child is three months old. The Chesterfield County rule requires the teacher to leave work at least four months, and to give notice at least six months, before the anticipated childbirth. Re-employment is guaranteed no later than the first day of the school year after the date she is declared re-eligible. Both schemes require a physician's certificate of physical fitness prior to the teacher's return. Each Court of Appeals reversed the court below, one holding the Chesterfield County maternity leave rule constitutional, the other holding the Cleveland rule unconstitutional. *Held:*

1. The mandatory termination provisions of both maternity rules violate the Due Process Clause of the Fourteenth Amendment. Pp. 639–648.

(a) The arbitrary cutoff dates (which obviously come at different times of the school year for different teachers) have no valid relationship to the State's interest in preserving continuity of instruction, as long as the teacher is required to give substantial advance notice that she is pregnant. Pp. 639–643.

(b) The challenged provisions are violative of due process since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of

*Together with No. 72–1129, *Cohen* v. *Chesterfield County School Board et al.*, on certiorari to the United States Court of Appeals for the Fourth Circuit.

continuing her duties, whereas any such teacher's ability to continue past a fixed pregnancy period is an individual matter; and the school boards' administrative convenience alone cannot suffice to validate the arbitrary rules. Pp. 643–648.

2. The Cleveland three-month return provision also violates due process, being both arbitrary and irrational. It creates an irrebuttable presumption that the mother (whose good health must be medically certified) is not fit to resume work, and it is not germane to maintaining continuity of instruction, as the precise point a child will reach the relevant age will occur at a different time throughout the school year for each teacher. Pp. 648–650.

3. The Chesterfield County return rule, which is free of any unnecessary presumption, comports with due process requirements. P. 650.

No. 72–777, 465 F. 2d 1184, affirmed; No. 72–1129, 474 F. 2d 395, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., concurred in the result. POWELL, J., filed an opinion concurring in the result, *post*, p. 651. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 657.

Charles F. Clarke argued the cause and filed a brief for petitioners in No. 72–777. *Philip J. Hirschkop* argued the cause for petitioner in No. 72–1129. With him on the brief was *John B. Mann.*

Jane M. Picker argued the cause for respondents in No. 72–777. With her on the brief were *Rita Page Reuss* and *Sidney Picker, Jr. Samuel W. Hixon III* argued the cause for respondents in No. 72–1129. With him on the brief was *Frederick T. Gray.*†

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†*Andrew J. Ruzicho* filed a brief for the International Association of Official Human Rights Agencies as *amicus curiae* urging affirmance in No. 72–777. *Philip J. Tierney* filed a brief for the Maryland Commission on Human Relations as *amicus curiae* urging reversal in No. 72–1129. Briefs of *amici curiae* urging affirmance in No. 72–1129 were filed by *Andrew P. Miller,* Attorney General, and *Walter H. Ryland,* Assistant Attorney General, for the Commonwealth of Vir-

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MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents in No. 72–777 and the petitioner in No. 72–1129 are female public school teachers. During the 1970–1971 school year, each informed her local school board that she was pregnant; each was compelled by a mandatory maternity leave rule to quit her job without pay several months before the expected birth of her child. These cases call upon us to decide the constitutionality of the school boards' rules.

I

Jo Carol LaFleur and Ann Elizabeth Nelson, the respondents in No. 72–777, are junior high school teachers employed by the Board of Education of Cleveland, Ohio. Pursuant to a rule first adopted in 1952, the school board requires every pregnant school teacher to take maternity leave without pay, beginning five months before the expected birth of her child. Application for such leave must be made no later than two weeks prior to the date of departure. A teacher on maternity leave is not allowed

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ginia, and by *Gordon Dean Booth, Jr., Richard S. Maurer,* and *Sidney F. Davis* for Delta Air Lines, Inc. Briefs of *amici curiae* urging reversal in No. 72–1129 and affirmance in No. 72–777 were filed by *Solicitor General Bork, Assistant Attorney General Pottinger, Louis F. Claiborne, Joseph T. Eddins,* and *Beatrice Rosenberg* for the United States; by *David Rubin* and *Jerry D. Anker* for the National Education Assn. et al.; by *Winn Newman* and *Ruth Weyand* for the International Union of Electrical, Radio and Machine Workers, AFL–CIO; by *Theodore R. Mann, Joseph B. Robison, Sylvia Roberts, Ruth Bader Ginsburg, Melvin L. Wulf,* and *John Ligtenberg* for the American Civil Liberties Union et al.; and by *Paul O. H. Pigman* for Margaret M. Broussard. *Evelle J. Younger,* Attorney General, *Elizabeth Palmer,* Assistant Attorney General, and *Joanne Condas,* Deputy Attorney General, filed a brief for the California Department of Human Resources Development as *amicus curiae.*

to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months. A doctor's certificate attesting to the health of the teacher is a prerequisite to return; an additional physical examination may be required. The teacher on maternity leave is not promised re-employment after the birth of the child; she is merely given priority in reassignment to a position for which she is qualified. Failure to comply with the mandatory maternity leave provisions is ground for dismissal.[1]

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[1] The Cleveland rule provides:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence.* A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years.*

"REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the* regular school semester which follows the child's age of *three (3) months.* In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written* request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (Emphasis in original.)

Neither Mrs. LaFleur nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year.[2] Because of the mandatory maternity leave rule, however, each was required to leave her job in March 1971.[3] The two women then filed separate suits in the United States District Court for the Northern District of Ohio under 42 U. S. C. § 1983, challenging the constitutionality of the maternity leave rule. The District Court tried the cases together, and rejected the plaintiffs' arguments. 326 F. Supp. 1208. A divided panel of the United States Court of Appeals for the Sixth Circuit reversed, finding the Cleveland rule in violation of the Equal Protection Clause of the Fourteenth Amendment.[4] 465 F. 2d 1184.

The petitioner in No. 72–1129, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia. That school board's maternity leave regulation requires that a pregnant teacher leave work at least four months prior to the expected birth of her child. Notice

[2] Mrs. LaFleur's child was born on July 28, 1971; Mrs. Nelson's child was born during August of that year.

[3] Effective February 1, 1971, the Cleveland regulation was amended to provide that only teachers with one year of continuous service qualified for maternity leave; teachers with less than one year were required to resign at the beginning of the fifth month of pregnancy. Since Mrs. Nelson had less than a year of service at the time she notified her principal that she was pregnant, the school board originally required her to resign her teaching position. The school board has since conceded that the February 1 amendment did not apply to Mrs. Nelson, since it was enacted after her contract of employment was executed. Pursuant to that concession, the board has placed Mrs. Nelson, like Mrs. LaFleur, on mandatory leave.

[4] Chief Judge Phillips filed a separate opinion, dissenting in part and concurring in part. He felt that the portion of the challenged regulation requiring maternity leave at the beginning of the fifth month of pregnancy was constitutional; he agreed with the majority, however, that the three-month post-delivery waiting period before becoming eligible to return to teaching was unconstitutional.

in writing must be given to the school board at least six months prior to the expected birth date. A teacher on maternity leave is declared re-eligible for employment when she submits written notice from a physician that she is physically fit for re-employment, and when she can give assurance that care of the child will cause only minimal interference with her job responsibilities. The teacher is guaranteed re-employment no later than the first day of the school year following the date upon which she is declared re-eligible.[5]

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[5] The Chesterfield County rule provides:

"MATERNITY PROVISIONS

"a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

"b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

"c. Maternity Leave

"(1) Maternity leave must be requested in writing at the time of termination of employment.

"(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

"(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

"(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

"(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

"(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy

Mrs. Cohen informed the Chesterfield County School Board in November 1970, that she was pregnant and expected the birth of her child about April 28, 1971.[6] She initially requested that she be permitted to continue teaching until April 1, 1971.[7] The school board rejected the request, as it did Mrs. Cohen's subsequent suggestion that she be allowed to teach until January 21, 1971, the end of the first school semester. Instead, she was required to leave her teaching job on December 18, 1970. She subsequently filed this suit under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of Virginia. The District Court held that the school board regulation violates the Equal Protection Clause, and granted appropriate relief. 326 F. Supp. 1159. A divided panel of the Fourth Circuit affirmed, but, on rehearing en banc, the Court of Appeals upheld the constitutionality of the challenged regulation in a 4–3 decision. 474 F. 2d 395.

We granted certiorari in both cases, 411 U. S. 947, in order to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers.[8]

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that occurs after the individual has been declared eligible for re-employment."

[6] Mrs. Cohen's child was in fact born on May 2.

[7] Unlike the Cleveland rule, n. 1, *supra*, the Chesterfield County regulation allows the superintendent of schools to extend a teacher's employment beyond the normal cutoff date, if he determines that such action is in the best interests of the students and school involved. See n. 5, *supra*.

[8] Apart from the cases here under review, there are at least three other reported federal appellate opinions dealing with the constitutionality of mandatory maternity leave regulations. Compare *Green* v. *Waterford Board of Education*, 473 F. 2d 629 (CA2), and *Buckley* v. *Coyle Public School System*, 476 F. 2d 92 (CA10) (both invalidating mandatory leave rules for pregnant public school teachers)

II

This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause

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with *Schattman* v. *Texas Employment Comm'n*, 459 F. 2d 32 (CA5) (upholding a leave policy of a state agency).

For opinions of the district courts dealing with mandatory maternity leaves, see, *e. g.*, *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (SD Ohio); *Pocklington* v. *Duval County School Board*, 345 F. Supp. 163 (MD Fla.); *Bravo* v. *Board of Education of the City of Chicago*, 345 F. Supp. 155 (ND Ill.); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (ND Cal.); *Seaman* v. *Spring Lake Park Independent School District*, 363 F. Supp. 944 (Minn.); *Monell* v. *Department of Social Services*, 357 F. Supp. 1051 (SDNY).

Cf. *Struck* v. *Secretary of Defense*, 460 F. 2d 1372 (CA9), vacated and remanded to consider the issue of mootness, 409 U. S. 1071; *Gutierrez* v. *Laird*, 346 F. Supp. 289 (DC); *Robinson* v. *Rand*, 340 F. Supp. 37 (Colo.) (all dealing with Air Force regulations requiring separation of pregnant personnel).

The practical impact of our decision in the present cases may have been somewhat lessened by several recent developments. At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, did not apply to state agencies and educational institutions. 42 U. S. C. §§ 2000e (b) and 2000e–1. On March 24, 1972, however, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92–261, 86 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 CFR § 1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

In addition, a number of other federal agencies have promulgated regulations similar to those of the Equal Employment Opportunity Commission, forbidding discrimination against pregnant workers with regard to sick leave policies. See, *e. g.*, 5 CFR § 630.401 (b) (Civil

of the Fourteenth Amendment. *Roe* v. *Wade*, 410 U. S. 113; *Loving* v. *Virginia*, 388 U. S. 1, 12; *Griswold* v. *Connecticut*, 381 U. S. 479; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390. See also *Prince* v. *Massachusetts*, 321 U. S. 158; *Skinner* v. *Oklahoma*, 316 U. S. 535. As we noted in *Eisenstadt* v. *Baird*, 405 U. S. 438, 453, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," *Skinner* v. *Oklahoma*, *supra*, at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted.

The school boards in these cases have offered two essentially overlapping explanations for their mandatory maternity leave rules. First, they contend that the firm cutoff dates are necessary to maintain continuity of classroom instruction, since advance knowledge of when

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Service Commission); 41 CFR § 60–20.3 (g) (Office of Federal Contract Compliance). See generally Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N. Y. L. F. 480, 487–490; Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260, 280–281. We, of course, express no opinion as to the validity of any of these regulations.

a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy. By keeping the pregnant teacher out of the classroom during these final months, the maternity leave rules are said to protect the health of the teacher and her unborn child, while at the same time assuring that students have a physically capable instructor in the classroom at all times.[9]

It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important

[9] The records in these cases suggest that the maternity leave regulations may have originally been inspired by other, less weighty, considerations. For example, Dr. Mark C. Schinnerer, who served as Superintendent of Schools in Cleveland at the time the leave rule was adopted, testified in the District Court that the rule had been adopted in part to save pregnant teachers from embarrassment at the hands of giggling schoolchildren; the cutoff date at the end of the fourth month was chosen because this was when the teacher "began to show." Similarly, at least several members of the Chesterfield County School Board thought a mandatory leave rule was justified in order to insulate schoolchildren from the sight of conspicuously pregnant women. One member of the school board thought that it was "not good for the school system" for students to view pregnant teachers, "because some of the kids say, my teacher swallowed a water melon, things like that."

The school boards have not contended in this Court that these considerations can serve as a legitimate basis for a rule requiring pregnant women to leave work; we thus note the comments only to illustrate the possible role of outmoded taboos in the adoption of the rules. Cf. *Green* v. *Waterford Board of Education*, 473 F. 2d, at 635 ("Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word").

objective of continuity. But, as the Court of Appeals for the Second Circuit noted in *Green* v. *Waterford Board of Education*, 473 F. 2d 629, 635:

> "Where a pregnant teacher provides the Board with a date certain for commencement of leave . . . that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute." (Footnote omitted.)

Thus, while the advance-notice provisions in the Cleveland and Chesterfield County rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not. Were continuity the only goal, cut-off dates much later during pregnancy would serve as well as or better than the challenged rules, providing that ample advance notice requirements were retained. Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date upon which to commence her leave, at least so long as the decision were required to be made and notice given of it well in advance of the date selected.[10]

In fact, since the fifth or sixth month of pregnancy

[10] It is, of course, possible that either premature childbirth or complications in the latter stages of pregnancy might upset even the most careful plans of the teacher, the substitute, and the school board. But there is nothing in these records to indicate that such emergencies could not be handled, as are all others, through the normal use of the emergency substitute teacher process. See *Green*, *supra*, at 635–636.

will obviously begin at different times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote. For example, the beginning of the fifth month of pregnancy for both Mrs. LaFleur and Mrs. Nelson occurred during March of 1971. Both were thus required to leave work with only a few months left in the school year, even though both were fully willing to serve through the end of the term.[11] Similarly, if continuity were the only goal, it seems ironic that the Chesterfield County rule forced Mrs. Cohen to leave work in mid-December 1970 rather than at the end of the semester in January, as she requested.

We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

The question remains as to whether the cutoff dates at the beginning of the fifth and sixth months can be justified on the other ground advanced by the school boards—the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate, both on educational and safety grounds. And, despite the plethora of conflicting medical testimony in these cases, we can as-

[11] Indeed, it is somewhat difficult to view the Cleveland mandatory leave rule as seriously furthering the goal of continuity, since the rule requires only two weeks' advance notice before the leave is to commence.

sume, *arguendo,* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.

The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See *Shelton* v. *Tucker,* 364 U. S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

As the Court noted last Term in *Vlandis* v. *Kline,* 412 U. S. 441, 446, "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." In *Vlandis,* the Court declared unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a Connecticut statute mandating an irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. We said in that case, *id.,* at 452:

> "[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has

reasonable alternative means of making the crucial determination."

Similarly, in *Stanley* v. *Illinois,* 405 U. S. 645, the Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause. Because of the statutory presumption, the State took custody of all illegitimate children upon the death of the mother, without allowing the father to attempt to prove his parental fitness. As the Court put the matter:

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.,* at 654 (footnotes omitted).

Hence, we held that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination. See also *United States Dept. of Agriculture* v. *Murry,* 413 U. S. 508; *id.,* at 514–517 (concurring opinion); *Bell* v. *Burson,* 402 U. S. 535; *Carrington* v. *Rash,* 380 U. S. 89.

These principles control our decision in the cases before us. While the medical experts in these cases differed on many points, they unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.[12] Even assuming, *arguendo,* that

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[12] There were three medical witnesses in the Cleveland case: Dr. Sarah Marcus and Dr. Veners Rutenbeigs (Mrs. Nelson's obstetrician), who testified on behalf of the respondents, and Dr. William C.

there are some women who would be physically unable to work past the particular cutoff dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in *Vlandis,* is neither "necessarily [nor] universally true," and is violative of the Due Process Clause.

The school boards have argued that the mandatory termination dates serve the interest of administrative convenience, since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives in this area. But, as the Court stated in *Stanley* v. *Illinois, supra,* at 656:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy govern-

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Weir, the petitioners' expert. While Dr. Weir generally disagreed with his colleagues on the potential effects of pregnancy on a teacher's job performance, he noted that each pregnancy was an individual matter, and should be prescribed for as such. Similarly, the two medical experts in the Chesterfield County case, Dr. Leo J. Dunn and Dr. David C. Forrest, testified that each particular pregnancy must be managed as an individual matter. Cf. R. Benson, Handbook of Obstetrics & Gynecology 109 (4th ed. 1971); Curran, Equal Protection of the Law: Pregnant School Teachers, 285 New England J. Medicine 336; Comment, Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis, 45 Temp. L. Q. 240, 245.

ment officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law.[13] The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.[14]

We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping

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[13] This is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records—for example, widespread medical consensus about the "disabling" effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.

[14] The school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom. For example, they could require the pregnant teacher to submit to medical examination by a school board physician, or simply require each teacher to submit a current certification from her obstetrician as to her ability to continue work. Indeed, when evaluating the physical ability of a teacher to *return* to work, each school board in this case relies upon precisely such procedures. See nn. 1 and 5, *supra;* see also text, *infra,* at 648–650.

physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

III

In addition to the mandatory termination provisions, both the Cleveland and Chesterfield County rules contain limitations upon a teacher's eligibility to return to work after giving birth. Again, the school boards offer two justifications for the return rules—continuity of instruction and the desire to be certain that the teacher is physically competent when she returns to work. As is the case with the leave provisions, the question is not whether the school board's goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon the teacher's constitutional liberty.

Under the Cleveland rule, the teacher is not eligible to return to work until the beginning of the next regular school semester following the time when her child attains the age of three months. A doctor's certificate attesting to the teacher's health is required before return; an additional physical examination may be required at the option of the school board.

The respondents in No. 72–777 do not seriously challenge either the medical requirements of the Cleveland rule or the policy of limiting eligibility to return to the next semester following birth. The provisions concerning a medical certificate or supplemental physical examination are narrowly drawn methods of protecting the

school board's interest in teacher fitness; these requirements allow an individualized decision as to the teacher's condition, and thus avoid the pitfalls of the presumptions inherent in the leave rules. Similarly, the provision limiting eligibility to return to the semester following delivery is a precisely drawn means of serving the school board's interest in avoiding unnecessary changes in classroom personnel during any one school term.

The Cleveland rule, however, does not simply contain these reasonable medical and next-semester eligibility provisions. In addition, the school board requires the mother to wait until her child reaches the age of three months before the return rules begin to operate. The school board has offered no reasonable justification for this supplemental limitation, and we can perceive none. To the extent that the three-month provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules.[15] The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this

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[15] It is clear that the factual hypothesis of such a presumption—that no mother is physically fit to return to work until her child reaches the age of three months—is neither necessarily nor universally true. See R. Benson, *supra,* n. 12, at 209 (patient may return to "full activity or employment" if course of progress up to fourth or fifth week is normal). Cf. Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev., at 262 n. 11, 287 n. 145.

Of course, it may be that the Cleveland rule is based upon another theory—that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light, the rule remains a conclusive presumption, whose underlying factual assumptions can hardly be said to be universally valid.

regard. And finally, the three-month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher.

Thus, we conclude that the Cleveland return rule, insofar as it embodies the three-month age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.

We perceive no such constitutional infirmities in the Chesterfield County rule. In that school system, the teacher becomes eligible for re-employment upon submission of a medical certificate from her physician; return to work is guaranteed no later than the beginning of the next school year following the eligibility determination.[16] The medical certificate is both a reasonable and narrow method of protecting the school board's interest in teacher fitness, while the possible deferring of return until the next school year serves the goal of preserving continuity of instruction. In short, the Chesterfield County rule manages to serve the legitimate state interests here without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty.

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[16] The Virginia rule also requires that the teacher give assurance that care of the child will not unduly interfere with her job duties. While such a requirement has within it the potential for abuse, there is no evidence on this record that the assurance required here is anything more than that routinely sought by employers from prospective employees—that the worker is willing to devote full attention to job duties. Nor is there any evidence in this record that the school authorities do not routinely accept the woman's assurance of her ability to return.

IV

For the reasons stated, we hold that the mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty. For similar reasons, we hold the three-month provision of the Cleveland return rule unconstitutional.

Accordingly, the judgment in No. 72–777 is affirmed; the judgment in No. 72–1129 is reversed, and the case is remanded to the Court of Appeals for the Fourth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE POWELL, concurring in the result.

I concur in the Court's result, but I am unable to join its opinion. In my view these cases should not be decided on the ground that the mandatory maternity leave regulations impair any right to bear children or create an "irrebuttable presumption." It seems to me that equal protection analysis is the appropriate frame of reference.

These regulations undoubtedly add to the burdens of childbearing. But certainly not every government policy that burdens childbearing violates the Constitution. Limitations on the welfare benefits a family may receive that do not take into account the size of the family illustrate this point. See *Dandridge* v. *Williams,* 397 U. S. 471 (1970). Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an

intentional governmental effort to "penalize" childbearing. See *ante*, at 640. The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional, and if *Dandridge, supra*, means what I think it does, then certainly these regulations are not invalid as an infringement of any right to procreate.

I am also troubled by the Court's return to the "irrebuttable presumption" line of analysis of *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (POWELL, J., not participating), and *Vlandis* v. *Kline*, 412 U. S. 441 (1973). Although I joined the opinion of the Court in *Vlandis* and continue fully to support the result reached there, the present cases have caused me to re-examine the "irrebuttable presumption" rationale. This has led me to the conclusion that the Court should approach that doctrine with extreme care. There is much to what MR. JUSTICE REHNQUIST says in his dissenting opinion, *post*, at 660, about the implications of the doctrine for the traditional legislative power to operate by classification. As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebuttable presumptions." If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause.

These cases present precisely the kind of problem susceptible of treatment by classification. Most school teachers are women, a certain percentage of them are pregnant at any given time, and pregnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. The constitutional difficulty is not that the boards attempted to deal with

this problem by classification. Rather, it is that the boards chose irrational classifications.

A range of possible school board goals emerge from the cases. Several may be put to one side. The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of schoolchildren.[1] The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records. The boards emphasize teacher absenteeism, classroom discipline, the safety of schoolchildren, and the safety of the expectant mother and her unborn child. No doubt these are legitimate concerns. But the boards have failed to demonstrate that these interests are in fact threatened by the continued employment of pregnant teachers.

To be sure, the boards have a legitimate and important interest in fostering continuity of teaching. And, even a normal pregnancy may at some point jeopardize that interest. But the classifications chosen by these boards, so far as we have been shown, are either counterproductive or irrationally overinclusive even with regard to this significant, nonillusory goal. Accordingly, in my opinion these regulations are invalid under rational-basis standards of equal protection review.[2]

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[1] See, *e. g., ante,* at 641 n. 9.

[2] I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, *e. g., Frontiero* v. *Richardson,* 411 U. S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of the regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest. While there are indeed some legitimate state interests at stake here, it has not been shown that they are rationally furthered by the challenged portions of these regulations.

In speaking of continuity of teaching, the boards are referring in part to their valid interest in reducing the number of times a new teacher is assigned to a given class. It is particularly appropriate to avoid teacher turnover in the middle of a semester, since continuity in teaching approach, as well as teacher-pupil relationships, is otherwise impaired. That aspect of the Cleveland regulation limiting a teacher's eligibility to return to the classroom to the semester following delivery, which the Court approves, *ante*, at 649, rationally serves this legitimate state interest. But the four- and five-month prebirth leave periods of the two regulations and the three-month post-birth provision of the Cleveland regulation do not. As the Court points out, *ante*, at 642–643, such cutoff points are more likely to prevent continuity of teaching than to preserve it. Because the cutoff dates occur throughout the school year, they inevitably result in the removal of many capable teachers from the classroom in the middle or near the end of a semester, thus provoking the disruption the boards hope to avoid.

The boards' reference to continuity of teaching also encompasses their need to assure constant classroom coverage by teachers who are up to the task. This interest is obviously legitimate. No one disputes that a school board must concern itself with the physical and emotional capabilities of its teachers. But the objectionable portions of these regulations appear to be bottomed on factually unsupported assumptions about the ability of pregnant teachers to perform their jobs. The overwhelming weight of the medical testimony adduced in these cases is that most teachers undergoing normal pregnancies are quite capable of carrying out their responsibilities until some ill-defined point a short period prior to term. Certainly the boards have made little effort to contradict this conclusion. Thus, it appears that by forcing all pregnant teachers undergoing a normal

pregnancy from the classroom so far in advance of term, the regulations compel large numbers of able-bodied teachers to quit work.[3] Once more, such policies inhibit, rather than further, the goal of continuity of teaching. For no apparent reason, they remove teachers from their students and require the use of substitutes.

The boards' reliance on the goal of continuity of teaching also takes into account their obvious planning needs. Boards must know when pregnant teachers will temporarily cease their teaching responsibilities, so that substitutes may be scheduled to fill the vacancies. And, planning requires both notice of pregnancy and a fixed termination date. It appears, however, that any termination date serves the purpose.[4] The choice of a cutoff date that produces several months of forced unemployment is thus wholly unnecessary to the planning of the boards. Certainly nothing in the records of these cases is to the contrary.

For the above reasons, I believe the linkage between the boards' legitimate ends and their chosen means is too attenuated to support those portions of the regulations overturned by the Court. Thus, I concur in the Court's result. But I think it important to emphasize the degree of latitude the Court, as I read it, has left the boards for dealing with the real and recurrent problems presented by teacher pregnancies. Boards may demand in every case "substantial advance notice of

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[3] Teachers who undergo abnormal pregnancies may well be disabled, either temporarily or for a substantial period. But as I read the Court, boards may deal with abnormal pregnancies like any other disability. *Ante*, at 642 n. 10.

[4] One may question, however, whether planning needs are well served by the mere two-week gap between notice and departure set forth in the Cleveland regulation. The brief notice the Cleveland board has allowed itself casts some doubt on that board's reliance on planning needs.

[pregnancy] . . . ." *Ante*, at 643. Subject to certain restrictions, they may require all pregnant teachers to cease teaching "at some firm date during the last few weeks of pregnancy. . . ." *Id.*, at 647 n. 13.[5] The Court further holds that boards may in all cases restrict re-entry into teaching to the outset of the school term following delivery. *Id.*, at 649.

In my opinion, such class-wide rules for pregnant teachers are constitutional under traditional equal protection standards.[6] School boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application. *E. g., San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 42–43 (1973). A large measure of discretion is essential to the effective discharge of the duties vested in these local, often elective, governmental units. My concern with the Court's

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[5] The Court's language does not specify a particular prebirth cutoff point, and we need not decide that issue, as these boards have attempted to support only four- and five-month dates. In light of the Court's language, however, I would think that a four-week prebirth period would be acceptable. I do not agree with the Court's view of the stringent standards a board must meet to justify a reasonable prebirth cutoff date. See *ante*, at 647 n. 13. Nothing in the Constitution mandates the heavy burden of justification the Court has imposed on the boards in this regard. If school boards must base their policies on a "widespread medical consensus . . . ," the "only reasonable method . . ." for accomplishing a goal, or a demonstration that needed services will otherwise be impossible to obtain, *ibid.*, they may be seriously handicapped in the performance of their duties.

[6] As the Court notes, these cases arose prior to the recent amendment extending Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, to state agencies and educational institutions. Pub. L. 92–261, 86 Stat. 103. See *ante*, at 639 n. 8. Like the Court, I do not address the impact of Title VII on mandatory maternity leave regulations.

opinion is that, if carried to logical extremes, the emphasis on individualized treatment is at war with this need for discretion. Indeed, stringent insistence on individualized treatment may be quite impractical in a large school district with thousands of teachers.

But despite my reservations as to the rationale of the majority, I nevertheless conclude that in these cases the gap between the legitimate interests of the boards and the particular means chosen to attain them is too wide. A restructuring generally along the lines indicated in the Court's opinion seems unavoidable. Accordingly, I concur in its result.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court rests its invalidation of the school regulations involved in these cases on the Due Process Clause of the Fourteenth Amendment, rather than on any claim of sexual discrimination under the Equal Protection Clause of that Amendment. My Brother STEWART thereby enlists the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions. In these cases we are told that although a regulation "requiring a termination of employment at some firm date during the last few weeks of pregnancy," *ante*, at 647 n. 13, might pass muster, the regulations here challenged requiring termination at the end of the fourth or fifth month of pregnancy violate due process of law.

As THE CHIEF JUSTICE pointed out in his dissent last year in *Vlandis* v. *Kline*, 412 U. S. 441, "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations . . . ." *Id.*, at 462. Hundreds of years ago in England, before Parliament came to be thought of as a body having general lawmaking power,

controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the King's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a civilized political society. It seems to me a little late in the day for this Court to weigh in against such an established consensus.

Countless state and federal statutes draw lines such as those drawn by the regulations here which, under the Court's analysis, might well prove to be arbitrary in individual cases. The District of Columbia Code, for example, draws lines with respect to age for several purposes. The Code requires that a person to be eligible to vote be 18 years of age,[1] that a male be 18 and a female be 16 before a valid marriage may be contracted,[2] that alcoholic beverages not be sold to a person under the age of 21 years,[3] or beer or light wines to any person under the age of 18 years.[4] A resident of the District of Columbia must be 16 years of age to obtain a permit to operate a motor vehicle,[5] and the District of Columbia delegate to the United States Congress must be 25 years old.[6] Nothing in the Court's opinion clearly demonstrates why its logic would not equally well sustain a challenge to these laws from a 17-year-old who insists that he is just as well informed for voting purposes as an 18-year-old, from a 20-year-old who insists that he is just as able to carry his liquor as a 21-year-old, or from the numerous other

[1] D. C. Code Ann. § 1–1102 (1973).
[2] *Id.*, § 30–103.
[3] *Id.*, § 25–121.
[4] *Ibid.*
[5] *Id.*, § 40–301.
[6] *Id.*, § 1–291 (b) (2).

persons who fall on the outside of lines drawn by these and similar statutes.

More closely in point is the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees. Title 5 U. S. C. § 8335 provides with respect to Civil Service employees:

> "(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service. . . ."

It was pointed out by my Brother STEWART only last year in his concurring opinion in *Roe* v. *Wade,* 410 U. S. 113, 168, that "the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. . . . Cf. . . . *Truax* v. *Raich,* 239 U. S. 33, 41." In *Truax* v. *Raich,* the Court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." 239 U. S. 33, 41 (1915).

Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility.

It has been said before, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), but it bears repeating here: All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification. The Court's disenchantment with "irrebuttable presumptions," and its preference for "individualized determination," is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.

The lines drawn by the school boards in the city of Cleveland and Chesterfield County in these cases require pregnant teachers to take forced leave at a stage of their pregnancy when medical evidence seems to suggest that a majority of them might well be able to continue teaching without any significant possibility of physical impairment. But, so far as I am aware, the medical evidence also suggests that in some cases there may be physical impairment at the stage of pregnancy fastened on by the regulations in question, and that the probability of physical impairment increases as the pregnancy advances. If legislative bodies are to be permitted to draw a general line anywhere short of the delivery room, I can find no judicial standard of measurement which says the ones drawn here were invalid. I therefore dissent.

ONEIDA INDIAN NATION OF NEW YORK ET AL. *v.* COUNTY OF ONEIDA, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-851. Argued November 6-7, 1973—Decided January 21, 1974

Petitioners brought this action for the fair rental value for a specified period of certain land in New York that the Oneidas had ceded to the State in 1795, alleging, *inter alia*, that the Oneidas had owned and occupied the land from time immemorial to the time of the American Revolution; that in the 1780's and 1790's various treaties with the United States had confirmed their right to possession of the land until purchased by the United States; that in 1790 the treaties had been implemented by the Nonintercourse Act forbidding the conveyance of Indian lands without the United States' consent; and that the 1795 cession was without such consent and hence ineffective to terminate the Oneidas' right to possession under the treaties and applicable federal statutes. The District Court, ruling that the action arose under state law, dismissed the complaint for failure to raise a question arising under the laws of the United States within the meaning of either 28 U. S. C. § 1331 or 28 U. S. C. § 1362. The Court of Appeals, relying on the "well-pleaded complaint rule" of *Taylor* v. *Anderson*, 234 U. S. 74, affirmed and held that although the decision would ultimately depend on whether the 1795 cession complied with the Nonintercourse Act, and what the consequences would be if it did not, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which essentially sought relief based on the right to possession of real property. *Held:* The complaint states a controversy arising under the Constitution, laws, or treaties of the United States sufficient to invoke the jurisdiction of the District Court under 28 U. S. C. §§ 1331 and 1362. Pp. 666-682.

(a) Petitioners asserted a current right to possession conferred by federal law, wholly independent of state law, the threshold allegation required of such a well-pleaded complaint—the right to possession—being plainly enough alleged to be based on federal law so that the federal law issue did not arise solely in anticipation of a defense. Pp. 666, 677.

(b) Petitioners' claim of a federal right to possession governed wholly by federal law is not so insubstantial or devoid of merit as to preclude a federal controversy within the District Court's jurisdiction, regardless of how the federal issue is ultimately resolved. Pp. 666–667.

(c) Indian title is a matter of federal law and can be extinguished only with federal consent. Pp. 670–674.

(d) This is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation. *Gully* v. *First National Bank*, 299 U. S. 109, distinguished. Pp. 675–676.

(e) In sustaining the District Court's jurisdiction, the well-pleaded complaint rule of *Taylor* v. *Anderson*, *supra*, is not disturbed, since here the right to possession itself is claimed to arise under federal law in the first instance, and allegedly aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. P. 676.

(f) The complaint satisfies the requirement that it reveal a dispute or controversy respecting the validity, construction, or effect of a federal law, upon the determination of which the result depends. Pp. 677–678.

(g) The conclusion that this case arises under the laws of the United States comports with the language and legislative history of 25 U. S. C. § 233 granting to New York civil jurisdiction over disputes between Indians or between Indians and others. Pp. 678–682.

464 F. 2d 916, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 682.

George C. Shattuck argued the cause and filed a brief for petitioners.

William L. Burke argued the cause for respondents and filed a brief for respondent County of Madison. *Raymond M. Durr* filed a brief for respondent County of Oneida.

Jeremiah Jochnowitz, Assistant Attorney General, argued the cause for the State of New York as *amicus*

curiae urging affirmance. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Solicitor General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Both § 1331 and § 1362 of Title 28 of the United States Code confer jurisdiction on the district courts to hear cases "aris[ing] under the Constitution, laws, or treaties of the United States." [1] Section 1331 requires that the amount in controversy exceed $10,000. Under § 1362, Indian tribes may bring such suits without regard to the amount in controversy. The question now before us is whether the District Court had jurisdiction over this case under either of these sections.

I

The complaint was filed in the United States District Court for the Northern District of New York by the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin against the Counties of Oneida and Madison in the State of New York.[2] The

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**Arthur Lazarus, Jr.,* filed a brief for the Association on American Indian Affairs, Inc., et al. as *amici curiae* urging reversal.

[1] Section 1331 (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Under § 1362:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

[2] Initially, only diversity jurisdiction under 28 U. S. C. § 1332 was alleged in the complaint. The necessary jurisdictional amount

complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1780's and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States [3] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the

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was averred. Federal-question jurisdiction was asserted by an amendment to the complaint. Jurisdiction under § 1332 was rejected by the District Court and the Court of Appeals and is not at issue here.

[3] Three treaties with the Six Indian Nations of the Iroquois Confederacy in New York were alleged: the Treaty of Fort Stanwix of 1784, which provides in part that "[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled"; The Treaty of Fort Harmar of 1789 where the Oneida and the Tuscarora nations were "again secured and confirmed in the possession of their respective lands"; and the Treaty of Canandaigua of 1794, Art. II of which provides: "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." The treaties referred to are found at 7 Stat. 15, 7 Stat. 33, and 7 Stat. 44, respectively.

Indians' right to possession under the federal treaties and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969.

The District Court ruled that the cause of action, regardless of the label given it, was created under state law and required only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. The possible necessity of interpreting a federal statute or treaties to resolve a potential defense was deemed insufficient to sustain federal-question jurisdiction. The complaint was accordingly dismissed for want of subject matter jurisdiction for failure of the complaint to raise a question arising under the laws of the United States within the meaning of either § 1331 or § 1362.

The Court of Appeals affirmed, with one judge dissenting, ruling that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule for determining federal question jurisdiction." 464 F. 2d 916, 918 (CA2 1972). Although "[d]ecision would ultimately turn on whether the deed of 1795 complied with what is now 25 U. S. C. § 177 and what the consequences would be if it did not," *id.*, at 919, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which was read as essentially seeking relief based on the right to possession of real property. The Court of Appeals thought *Taylor* v. *Anderson*, 234 U. S. 74 (1914), directly in point. There, a complaint in ejectment did not state a claim arising under the laws of the United States even though it alleged that the defendants were claiming under a deed that was void under acts of Congress restraining

the alienation of lands allotted to Choctaw and Chickasaw Indians. The Court applied the principle that whether a case arises under federal law for purposes of the jurisdictional statute "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Id.*, at 75–76. Because the only essential allegations were plaintiffs' rights to possession, defendants' wrongful holding and the damage claim, the complaint did not properly assert a federal issue, however likely it might be that it would be relevant to or determinative of a defense. In the present case, noting that the District Judge was correct in holding that under New York law these allegations would suffice to state a cause of action in ejectment, the Court of Appeals considered *Taylor* to be dispositive.

Both the District Court and the Court of Appeals were in error, and we reverse the judgment of the Court of Appeals.

II

Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be

the ultimate resolution of the federal issues on the merits. See, *e. g.*, *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913); *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 130 (1906); *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105–106 (1933); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951). Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.

It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any

state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." [4] This has remained the policy of the United States to this day. See 25 U. S. C. § 177.

In *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:

> " 'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' *Cramer* v. *United States*, 261 U. S. 219, 227. This policy was first recognized in *Johnson* v. *M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester* v. *Georgia*, 6 Pet. 515; *Mitchel* v. *United States*, 9 Pet. 711; *Chouteau* v. *Molony*, 16 How. 203; *Holden* v. *Joy*, 17 Wall. 211; *Buttz* v. *Northern Pacific Railroad*[, 119 U. S. 55]; *United States* v. *Shoshone Tribe*, 304 U. S. 111. As stated in *Mitchel* v. *United States*, *supra*, p. 746, Indian 'right of occu-

[4] Section 4 of the Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The second Nonintercourse Act passed in 1793 made it a misdemeanor to negotiate for Indian lands without federal authority, but it was made lawful for state agents who were present at any treaty held with the Indians under the authority of the United States, in the presence and with the approbation of the United States Commissioner, "to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty." 1 Stat. 329, 330–331, § 8. This statutory policy, without major change, was carried forward in § 12 of the 1796 Act, 1 Stat. 469, 472; § 12 of the 1799 Act, 1 Stat. 743, 746; § 12 of the 1802 Act, 2 Stat. 139, 143; § 12 of the Act of 1834, 4 Stat. 729, 730–731; and in Rev. Stat. § 2116, now 25 U. S. C. § 177.

> pancy is considered as sacred as the fee simple of the whites.' "

The *Santa Fe* case also reaffirmed prior decisions to the effect that a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." *Id.*, at 347. Tribal rights were nevertheless entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the "power of Congress . . . is supreme." *Ibid.*

As indicated in *Santa Fe*, the fundamental propositions which it restated were firmly rooted in earlier cases. In *Johnson* v. *M'Intosh*, 8 Wheat. 543 (1823), the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government. The land in question, when ceded to the United States by the State of Virginia, was "occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." *Id.*, at 586. See also *id.*, at 591–597, 603. The possessory and treaty rights of Indian tribes to their lands have been the recurring theme of many other cases.[5]

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[5] Representative of almost countless cases are *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831); *United States* v. *Rogers*, 4 How. 567 (1846); *The Kansas Indians*, 5 Wall. 737 (1866); *The New York Indians*, 5 Wall. 761 (1867); *Holden* v. *Joy*, 17 Wall. 211 (1872); *Beecher* v. *Wetherby*, 95 U. S. 517 (1877); *United States* v. *Kagama*, 118 U. S. 375 (1886); *Spalding* v. *Chandler*, 160 U. S. 394 (1896); *United States* v. *Sandoval*, 231 U. S. 28 (1913); *Nadeau* v. *Union Pacific R. Co.*, 253 U. S. 442 (1920); *Minnesota* v. *United States*, 305 U. S. 382 (1939); *United States* v. *Tillamooks*, 329 U. S. 40 (1946); *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272 (1955). U. S. Dept. of Interior, Federal Indian Law 32–43, 583–645,

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher* v. *Peck*, 6 Cranch 87 (1810).[6] But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

For example, in *Worcester* v. *Georgia*, 6 Pet. 515 (1832), the State of Georgia sought to prosecute a white man for residing in Indian country contrary to the laws of the State. This Court held the prosecution a nullity, the Chief Justice referring to the treaties with the Cherokees and to the

> "universal conviction that the Indian nations possessed a full right to the lands they occcupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary

675–687 (1958) (hereinafter Federal Indian Law), sets out some of the fundamentals of the law dealing with Indian possessory rights to real property stemming from aboriginal title, treaty, and statute.

[6] See also *Cherokee Nation* v. *Georgia*, *supra*, at 38; *Clark* v. *Smith*, 13 Pet. 195 (1839); *Lattimer* v. *Poteet*, 14 Pet. 4 (1840); *Seneca Nation* v. *Christy*, 162 U. S. 283 (1896). "Outside of the territory of the original colonies, the ultimate fee is located in the United States and may be granted to individuals subject to the Indian right of occupancy." Federal Indian Law 599; *Missouri* v. *Iowa*, 7 How. 660 (1849).

> line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States." *Id.*, at 560.

The Cherokee Nation was said to be occupying its own territory "in which the laws of Georgia can have no force . . . ." The Georgia law was declared unconstitutional because it interfered with the relations "between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union." *Id.*, at 561.

There are cases of similar import with respect to the New York Indians. These cases lend substance to petitioners' assertion that the possessory right claimed is a *federal* right to the lands at issue in this case. *Fellows* v. *Blacksmith*, 19 How. 366, 372 (1857), which concerned the Seneca Indians, held that the "forcible removal [of Indians] must be made, if made at all, under the direction of the United States [and] that this interpretation is in accordance with the usages and practice of the Government in providing for the removal of Indian tribes from their ancient possessions." In *The New York Indians*, 5 Wall. 761 (1867), the State sought to tax the reservation lands of the Senecas. The Court held the tax void. The Court referred to the Indian right of occupancy as creating "an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption," *id.*, at 771, and noted that New York "possessed no power to deal with Indian rights or title," *id.*, at 769. Of major importance, however, was the treaty of 1794 in which the United States acknowledged

certain territory to be the property of the Seneca Nation and promised that "it shall remain theirs until they choose to sell the same to the people of the United States . . . ." *Id.*, at 766–767. The rights of the Indians to occupy those lands "do not depend on . . . any . . . statutes of the State, but upon treaties, which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them." *Id.*, at 768.[7] The State's attempt to tax reservation lands was invalidated as an interference with Indian possessory rights guaranteed by the Federal Government.

Much later, in *United States* v. *Forness*, 125 F. 2d 928 (CA2), cert. denied, *sub nom. City of Salamanca* v. *United States*, 316 U. S. 694 (1942),[8] the Government sued

[7] In an earlier case, *New York ex rel. Cutler* v. *Dibble*, 21 How. 366 (1859), the Court had upheld New York statutes which protected the Indians from intrusion by others on their tribal lands, and had asserted that "[n]otwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion." *Id.*, at 370. It is apparent that by the later decision in *The New York Indians*, *supra*, the Court did not consider the potential implications of the dictum expressed in *Dibble* applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands. In any event, whatever *Dibble* may have held with respect to state power to protect Indian possession, it does not question the Indians' right to possession under *federal* law.

[8] The question of the application of federal law to Indian tribal property in New York was litigated in the state courts in the intervening years as well. In 1870, an unreported decision of the New York Supreme Court held that tribal leases of Seneca reservation lands, ratified by the New York Legislature, were invalid in the absence of approval from the United States. See *United States* v. *Forness*, *supra*, at 930–931; H. R. Rep. Misc. Doc. No. 75, 43d

to set aside certain leases granted by the Seneca tribe on certain reservation lands. It was argued in opposition that the suit was merely an action for eject-

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Cong., 2d Sess. (1875); Brief for the Warden and the State of New York 26–27, *New York ex rel. Ray* v. *Martin*, No. 158, O. T. 1945, 326 U. S. 496 (1946). In the mid-1890's in *Buffalo, R. & P. R. Co.* v. *Lavery*, 75 Hun. 396, 27 N. Y. S. 443 (5th Dept., App. Div. 1894), affirmed on opinion below, 149 N. Y. 576, 43 N. E. 986 (1896), a private non-Indian lessee of Indian land under a lease first granted by the Senecas in 1866, which was concededly not legally effective until an 1875 Act of Congress validated such leases, was nonetheless held to have priority over a railroad claiming under an 1872 lease from the Senecas and a state statute purportedly validating the lease as one to a railroad which had been ratified by a state court, because the state statute which would have given the railroad a superior right to possession was incapable of confirming possessory rights to Indian tribal lands without federal authority. The New York courts held that it was "not within the legislative power of the State to enable the Indian nation to make, or others to take from the Indians, grants or leases of lands within their reservations. In that matter the Federal government, having the power under the Constitution to do so, has assumed to control it by . . . act of Congress [referring to the Indian Nonintercourse Act]. . . . As respects their lands, subject only to the pre-emptive title, the Indians are treated as the wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or leased from them." 75 Hun., at 399–400, 27 N. Y. S., at 445.

Still later, in *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, 105 N. E. 1048 (1914), the New York Court of Appeals held that without the consent of Congress New York could not prosecute Indian crimes on reservations. Relying on the classic federal cases, the court held that federal power was pre-eminent and that the Federal Government had made treaties with the Indians which confirmed their territorial possession, although the Federal Government never owned the fee of the land within the State's confines. *Id.*, at 192, 105 N. E., at 1050. Within the reservation federal power, when exercised, foreclosed the exercise of power by the State. "It is said that there is a difference between the Indians whose reservations are the direct gift of the Federal Government and those whose reservations have been derived from

ment which under state law could be defeated by a tender; but the Court of Appeals for the Second Circuit held that the Indian rights were federal and that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent." *Id.*, at 932. There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.[9]

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the state or from other sources. We find no such distinction in the statute, and we can think of none that logically differentiates one from the other. Even if we assume that, in the absence of Federal legislation, the state has the most ample power to legislate for the Indians within its borders, there seems to be no escape from the conclusion that when Congress does act the power of the state must yield to the paramount authority of the Federal government." *Id.*, at 196–197, 105 N. E., at 1052.

[9] Still later, federal authority over Indian lands was again challenged. In *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (1958), the Court of Appeals for the Second Circuit rejected New York's claim that the Nonintercourse Act did not apply to the State of New York and that, as one of the original 13 States, it never surrendered to the United States its power to condemn Indian lands. The Court of Appeals also held that the Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. § 233, whereby the United States ceded civil jurisdiction over Indian reservations to the State of New York, expressly and effectively excepted from its coverage the alienation of reservation lands, a matter over which the United States had reaffirmed its paramount authority. Nonetheless, the Court of Appeals held that the Niagara River Power Project Act, 71 Stat. 401 (1957), 16 U. S. C. §§ 836, 836a, by which Congress directed the Federal Power Commission to issue a license to the New York Power Authority for the construction and operation of a power

III

Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully* v. *First National Bank,* 299 U. S. 109 (1936). There, the suit was on a contract having its

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project to utilize water made available to the United States by a 1950 treaty with Canada, constituted federal authorization for the Power Authority to exercise the right of eminent domain, but only in accordance with § 21 of the Federal Power Act, 41 Stat. 1074, 16 U. S. C. § 814, which permits the acquisition of sites for the purpose of developing waterways by the exercise of the right of eminent domain in the federal district court in which the land is located or in the state courts. Because the Power Authority had proceeded to appropriate a portion of the Tuscaroras' reservation lands by filing a map and other documents pursuant to procedures established by the State's Highway Law and Public Authorities Law, those proceedings were vacated and annulled. Subsequently, the Power Authority abandoned efforts to obtain possession of the land by appropriation pursuant to those statutes and instead proceeded by condemnation proceedings in the District Court for the Western District of New York. The Tuscaroras petitioned for review of the Court of Appeals decision, but the Court denied certiorari. 358 U. S. 841 (1958). The Superintendent of Public Works of the State of New York simultaneously appealed from it under 28 U. S. C. § 1254 (2), and the Court, on the Tuscaroras' subsequent suggestion of mootness, which the Power Authority supported and the Superintendent continued to oppose, and which was based on the Power Authority's abandonment of its appropriation proceedings in favor of the condemnation suit, vacated the Court of Appeals' judgment and remanded to the District Court with directions to dismiss the complaint as moot. 362 U. S. 608 (1960). See Records and Briefs in No. 384, O. T. 1958; Records and Briefs in No. 4, O. T. 1959.

genesis in state law, and the tax that the defendant had promised to pay was imposed by a state statute. The possibility that a federal statute might bar its collection was insufficient to make the case one arising under the laws of the United States.

Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule of *Taylor* v. *Anderson, supra,* and like cases.[10] Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. In *Taylor,* the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands. See 32 Stat. 641. Individual patents had been issued with only the right to alienation being restricted for a period of time. Cf. *Minnesota* v. *United States,* 305 U. S. 382, 386 n. 1 (1939); *McKay* v. *Kalyton,* 204 U. S. 458 (1907). Insofar as the underlying right to possession is concerned, *Taylor* is more like those cases indicating that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougal,* 225 U. S. 561, 570 (1912).[11] Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for "arising under" jurisdiction merely to allege that owner-

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[10] See, *e. g., Gold-Washing & Water Co.* v. *Keyes,* 96 U. S. 199 (1878); *Florida C. & P. R. Co.* v. *Bell,* 176 U. S. 321 (1900); *Filhiol* v. *Maurice,* 185 U. S. 108 (1902); *Filhiol* v. *Torney,* 194 U. S. 356 (1904); *Joy* v. *City of St. Louis,* 201 U. S. 332 (1906); *White* v. *Sparkill Realty Corp.,* 280 U. S. 500 (1930).

[11] *Florida C. & P. R. Co.* v. *Bell, supra,* at 328–329; *Joy* v. *City of St. Louis, supra,* at 341–342.

ship or possession is claimed under a United States patent. *Joy* v. *City of St. Louis,* 201 U. S. 332, 342–343 (1906). As the Court stated in *Packer* v. *Bird,* 137 U. S. 661, 669 (1891):

> "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

For the same reasons, we think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a "dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal, supra,* at 569; *Gold-Washing & Water Co.* v. *Keyes,* 96 U. S. 199, 203 (1878).[12] Here, the Oneidas assert a present right to possession based in part on their aboriginal right of occupancy which was not terminable except by act of the United States.

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[12] *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454, 460 (1894); *Joy* v. *City of St. Louis, supra,* at 340.

Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States, and "it is to these treaties [that] we must look to ascertain the nature of these [Indian] rights, and the extent of them." *The New York Indians*, 5 Wall., at 768. Finally, the complaint asserts a claim under the Nonintercourse Acts which put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

IV

This is not to ignore the obvious fact that New York had legitimate and far-reaching connections with its Indian tribes antedating the Constitution and that the State has continued to play a substantial role with respect to the Indians in that State.[13] There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians. *Fellows* v. *Blacksmith*, *The New York Indians*, *United States* v. *Forness*, and the *Tuscarora* litigation are sufficient evidence that the reach and exclusivity of federal law with respect to reservation lands and reservation Indians did not go unchallenged; and it may be that they are to some extent challenged here. But this only

[13] For brief accounts of the New York experience with its Indians, see Federal Indian Law 965–979; Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1 (1958); Brief for the Warden and the State of New York, *New York ex rel. Ray* v. *Martin*, No. 158, O. T. 1945, 326 U. S. 496 (1946).

underlines the legal reality that the controversy alleged in the complaint may well depend on what the reach and impact of the federal law will prove to be in this case.

We are also aware that New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State. 62 Stat. 1224, 25 U. S. C. § 232. In addition, in 1950 civil disputes between Indians or between Indians and others were placed within the jurisdiction of the state courts "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State." 64 Stat. 845, 25 U. S. C. § 233.[14] The latter statute, however, provided for the

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[14] Section 233 provides:

"Jurisdiction of New York State courts in civil actions.

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided,* That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further,* That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:

preservation of tribal laws and customs and saved Indian reservation lands from taxation and, with certain exceptions, from execution to satisfy state court judgments. Furthermore, it provided that nothing in the statute "shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York" or as "conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The Senate report on the bill disclaimed any intention of "impairing any of their property or rights under existing treaties with the United States." S. Rep. No. 1836, 81st Cong., 2d Sess., 2 (1950). Under the penultimate proviso the matter of alienating tribal reservation lands would appear to have been left precisely where it was prior to the Act.[15] Moreover, the final proviso of the statute

Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further,* That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

[15] "The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the

negativing the application of state law with respect to transactions prior to the adoption of the Act was added by amendment on the floor of the Senate, and its purpose was explained by the gentleman who offered it to be as follows:

> "Mr. Chairman, I do not think there will be any objection from any source with regard to this particular amendment. This just assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great State of New York in regard to their lands.
>
> "I think there will be no objection to that; they certainly ought to have a right to have those claims properly adjudicated. . . .

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exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation and that negatives any authorization of 'the alienation from any Indian nation, tribe, or band of Indians of any land within any Indian reservation in the State of New York.' The Senate Committee's report on that law emphasizes that 'State law does not apply to Indians except so far as the United States has given its consent' and points out that the law provides that 'no lands within any reservation be alienated.' During the congressional hearings, most Indian leaders continued to oppose the bills, partly because of fear of state attempts to deprive them of their reservations, despite the New York Joint Committee's repeated assurances. Accordingly, New York's representatives once more disavowed any intention to break up the reservations and, more clearly than some state officials in the history of the controversy, disclaimed any state power to do so. Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue." Gunther, *supra*, n. 13, 8 Buffalo L. Rev., at 16. (Footnotes omitted.)

> "In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision." 96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris).

Our conclusion that this case arises under the laws of the United States is, therefore, wholly consistent with and in furtherance of the intent of Congress as expressed by its grant of civil jurisdiction to the State of New York with the indicated exceptions.[16]

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, concurring.

The majority opinion persuasively demonstrates that the plaintiffs' right to possession in this case was and is rooted firmly in federal law. Thus, I agree that this is not a case which depends for its federal character solely on possible federal defenses or on expected responses to

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[16] Because of our determination that the complaint states a controversy arising under the laws of the United States sufficient to invoke the jurisdiction of the District Court under §§ 1331 and 1362, in accordance with prior decisions of this Court, we have no occasion to address and do not reach the contention pressed by petitioners that the Congress, in enacting § 1362 in 1966, 80 Stat. 880, intended to expand the scope of "arising under" jurisdiction in the District Courts, beyond what judicial interpretations of that language have allowed under § 1331, for that category of suits brought by Indian tribes, in addition to eliminating the amount in controversy requirement when Indian tribes sue.

possible defenses. I also agree that the majority decision is consistent with our decision in *Gully* v. *First National Bank*, 299 U. S. 109 (1936). However, I think it worthwhile to add a brief concurrence to emphasize that the majority opinion does not disturb the long line of this Court's cases narrowly applying the principles of 28 U. S. C. § 1331 and the well-pleaded complaint rule to possessory land actions brought in federal court.

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in *Taylor* v. *Anderson*, 234 U. S. 74 (1914). Thus the complaint must be judged according to the rules applicable to such cases.

The federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. The narrow view of the scope of federal-question jurisdiction taken by the federal courts in such cases probably reflects a recognition that federal issues were seldom apt to be dispositive of the lawsuit. Commonly, the grant of a land patent to a private party carries with it no guarantee of continuing federal interest and certainly carries with it no indefinitely redeemable passport into federal court. On the contrary, as the majority points out, the land thus conveyed was generally subject to state law thereafter.

Thus, this Court's decisions have established a strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case. As the Court noted in *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507 (1900), "a suit to enforce a right which takes its origin in the laws of the United

States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws." This rule was even applied to cases in which land grants to Indians, subject to limited restrictions on alienation, were involved. See *Taylor, supra.*

The majority today finds this strict rule inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility.

The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today.

Per Curiam

SNIDER ET AL. *v.* ALL STATE ADMINISTRATORS, INC., ET AL.

ON MOTION TO DISPENSE WITH PRINTING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–731. Decided January 21, 1974

Motion to dispense with printing petition for certiorari as required by this Court's Rule 39, which motion is supported by only generalized allegations of inability to afford payment of costs of printing (as that term is defined in the Rule) and does not comply with Rule 53 governing *in forma pauperis* proceedings, is disfavored, the Court not being disposed to waive the functional standards established by Rule 39.

Motion denied; see 481 F. 2d 387.

PER CURIAM.

Petitioner Snider has filed a motion to dispense with the printing of the petition for certiorari as required by our Rule 39. He has filed no motion and affidavit in conformity with our Rule 53, dealing with proceedings *in forma pauperis*. While we undoubtedly have authority to waive the application of particular rules in appropriate circumstances, we have during this Term denied a considerable number of similar motions.* Typically in each of these cases the moving petitioner made generalized allegations of inability to afford payment of printing costs, but made no showing sufficient to comply with Rule 53 governing proceedings *in forma pauperis*. Motions such as these are disfavored, and petitioner's motion is denied.

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* See, *e. g.*, *Wallace* v. *Smith*, No. 73–40, motion denied October 15, 1973, *post*, p. 907; *Broccolino* v. *Maryland Comm'n on Judicial Disabilities*, No. 73–431, motion denied November 19, 1973, *post*, p. 1038; *Chippas* v. *United States*, No. 73–761, motion denied December 17, 1973, *post*, p. 1109. See also *Morton* v. *Mancari*, No. 73–362, motion to dispense with printing the motion to dismiss or affirm denied January 14, 1974, *post*, p. 1142.

Rule 39, entitled "Form of appendices, petitions, briefs, etc.," contains the following definition:

> "Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies. If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely."

We think it is clear from this definition, and from the other parts of Rule 39, that documents governed by Rule 39 need not have been imprinted on a press in order to comply with its terms. They are required to be the product of a process "capable of producing a clear black image on white paper," and to conform to the paper-size, binding, and type-size requirements also set forth in the Rule. The Rule is thus functional in nature, and is designed to assure the Court that appendices, petitions, briefs, and the like which are subject to its provisions will be of uniform size and good legibility. We are not disposed to waive these standards.

In future cases, the Clerk will be instructed not to accept for record a petition for certiorari or other document which is subject to Rule 39 and fails to conform to the requirements of that Rule, and to submit only the motion to dispense with printing to the Court for decision. In the event such motion is denied, the petition or other document will be returned to the party seeking to file it at the time the order of denial is entered.

Petitioner's motion to dispense with printing the petition for certiorari in this case is denied. Because our view as to the probable fate of motions such as his may not heretofore have been apparent to the Bar, he is granted 21 days from the entry of this order in which to file a petition which conforms to Rule 39.

Reporter's Note

The next page is purposely numbered 801. The numbers between 686 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1972 THROUGH JANUARY 21, 1974

Cases Dismissed in Vacation

No. 73–8. Pacific Southwest Airlines *v.* United States. D. C. C. D. Cal. Motion for leave to file petition for writ of certiorari dismissed July 26, 1973, under Rule 60 of the Rules of this Court.

No. 73–7. California et al. *v.* United States. D. C. C. D. Cal. Motion for leave to file petition for writ of certiorari dismissed July 30, 1973, under Rule 60 of the Rules of this Court.

No. 72–6599. Baxter et al. *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed August 2, 1973, under Rule 60 of the Rules of this Court. Reported below: 492 F. 2d 150; 199; 200.

No. 72–6916. Wignall *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed September 6, 1973, under Rule 60 of the Rules of this Court.

No. 72–6927. Sanchez *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed September 19, 1973, under Rule 60 of the Rules of this Court.

October 9, 1973

Affirmed on Appeal

No. 72–1477. United States *v.* Topco Associates, Inc. Affirmed on appeal from D. C. N. D. Ill. Mr. Justice Douglas would note probable jurisdiction and set case for oral argument. See 319 F. Supp. 1031.

No. 72–6995. JAMERSON ET AL. *v.* LENNOX, SHERIFF, ET AL. Affirmed on appeal from D. C. E. D. Pa. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 356 F. Supp. 1164.

No. 73–76. LUNG ET AL. *v.* O'CHESKEY ET AL. Affirmed on appeal from D. C. N. M. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 358 F. Supp. 928.

No. 73–118. AMMEX WAREHOUSE CO., INC., ET AL. *v.* GALLMAN ET AL. Affirmed on appeal from D. C. N. D. N. Y. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 72–1489. TEXAS *v.* PRUETT. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment affirmed. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 470 F. 2d 1182.

No. 72–1535. CHIMENTO *v.* STARK, SECRETARY OF STATE OF NEW HAMPSHIRE. Appeal from D. C. N. H. Motion to dispense with printing jurisdictional statement granted. Judgment affirmed. Reported below: 353 F. Supp. 1211.

No. 72–1675. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 72–1676. BRAY LINES, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeals from D. C. W. D. Okla. Reported below: 353 F. Supp. 1240.

Appeals Dismissed

No. 72–1155. DIXON *v.* DIXON. Appeal from Super. Ct. N. J. Motion to dispense with printing jurisdic-

tional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–1448. HOWELL *v.* JONES, SHERIFF. Appeal from Ct. Crim. App. Tex. Motion of Criminal Trial Lawyers Association of Northern California for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 488 S. W. 2d 123.

No. 72–1571. SCHWARTZ *v.* TALMO, DBA WARREN'S MASONRY, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 295 Minn. 356, 205 N. W. 2d 318.

No. 72–1586. CAMPBELL ET AL. *v.* OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 265 Ore. 802, 506 P. 2d 163.

No. 72–1626. SHAW ET AL., TRUSTEES *v.* COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS; and

No. 72–1627. FROST, EXECUTOR *v.* COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS. Appeals from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 293 N. E. 2d 862.

No. 72–1670. TEXAD, INC. (TEXAD SPECIALTY CO.) *v.* PARISH OF ST. MARY SALES AND USE TAX DEPT. Appeal from Ct. App. La., 1st Cir., dismissed for want of substantial federal question. Reported below: 271 So. 2d 549.

No. 72–1735. INSURANCE COMPANY OF NORTH AMERICA *v.* MONTGOMERY, DIRECTOR, FINANCIAL INSTITUTIONS OF ILLINOIS. Appeal from App. Ct. Ill., 4th Dist., dismissed for want of substantial federal question. Reported below: 8 Ill. App. 3d 871, 291 N. E. 2d 40.

No. 72–6984. GERARD *v.* WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 57 Wis. 2d 611, 205 N. W. 2d 374.

No. 73–5. SIMANCO, INC. *v.* WISCONSIN DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 57 Wis. 2d 47, 203 N. W. 2d 648.

No. 73–123. CALIFORNIA *v.* JONES ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question. Reported below: 30 Cal. App. 3d 852, 106 Cal. Rptr. 749.

No. 73–148. SHAPIRO *v.* CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 32 N. Y. 2d 96, 296 N. E. 2d 230.

No. 72–1682. SHELOFSKY ET AL. *v.* HELSBY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 32 N. Y. 2d 54, 295 N. E. 2d 774.

No. 72–6413. NUTTALL *v.* DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Motion to defer consideration denied. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6628. VIRAMONTES *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6757. DUN LEAVAY *v.* HALLAHAN ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6832. LONG *v.* GAMMILL ET AL. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6932. DIGGS *v.* HALL ET AL. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–138. BUNGE CORP. *v.* FEDERAL BARGE LINES, INC., ET AL. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 275 So. 2d 868.

No. 73–5019. GARGALLO *v.* GARGALLO. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 472 F. 2d 1219.

No. 72–6900. DOE *v.* PLANNED PARENTHOOD ASSOCIATION OF UTAH. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon

the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 29 Utah 2d 356, 510 P. 2d 75.

No. 73–213. FORTIER, AKA FONTAINE *v.* PROJECT HOPE, INC. Appeal from Sup. Ct. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–215. FALKNER ET UX. *v.* FERGUSON, JUDGE, ET AL. Appeal from D. C. S. D. Fla. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed. *Mengelkoch* v. *Industrial Welfare Commission,* 393 U. S. 83 (1968), and *Wilson* v. *City of Port Lavaca,* 391 U. S. 352 (1968).

No. 73–216. FALKNER ET UX. *v.* FERGUSON, JUDGE, ET AL. Appeal from D. C. S. D. Fla. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. *Mengelkoch* v. *Industrial Welfare Commission,* 393 U. S. 83 (1968).

No. 73–249. UNION PACIFIC RAILROAD CO. *v.* HECKERS, EXECUTIVE DIRECTOR, DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS concurs, being of the view that a corporation is not a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 576 (DOUGLAS, J., dissenting). Reported below: —— Colo. ——, 509 P. 2d 1255.

Certiorari Granted—Vacated and Remanded

No. 72–1210. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, LOCAL LODGE No. 504, ET AL. *v.* O'REILLY ET AL.; and

No. 72–1502. NATIONAL LABOR RELATIONS BOARD *v.* MORTON SALT CO. C. A. 9th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *NLRB* v. *Boeing Co.*, 412 U. S. 67 (1973). Reported below: 472 F. 2d 416 and 426.

No. 72–1485. BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the Western District of Texas with directions to dismiss case as moot. MR. JUSTICE DOUGLAS dissents from vacating judgment below. Reported below: 472 F. 2d 218.

No. 72–1678. CAREY, WARDEN, ET AL. *v.* GAMMONS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cady* v. *Dombrowski*, 413 U. S. 433 (1973). MR. JUSTICE DOUGLAS dissents from the vacation and remand. Reported below: 475 F. 2d 1397.

No. 72–6454. HANAHAN *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Northern District of Illinois for reconsideration in light of suggestion contained in the Solicitor General's memorandum filed July 3, 1973.

No. 72–6690. LEE *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certio-

rari granted. Judgment vacated and case remanded to the United States District Court for the Southern District of Florida with directions to dismiss the indictment. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons stated in the dissenting opinion of MR. JUSTICE BLACKMUN in *Durham* v. *United States*, 401 U. S. 481, 483 (1971). See *Bradley* v. *United States*, 404 U. S. 567 (1972). Reported below: 472 F. 2d 1407.

No. 72–6812. CHENOWETH *v.* WARNER, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Northern District of California with directions to dismiss case as moot.

No. 72–6836. RUSSELL *v.* DOUTHITT. Sup. Ct. Ind. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). Reported below: —— Ind. ——, 291 N. E. 2d 361.

No. 73–6. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA & VICINITY *v.* SAMOFF, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the Eastern District of Pennsylvania with directions to dismiss case as moot. Reported below: 475 F. 2d 203.

No. 73–217. PENNSYLVANIA *v.* CAMPANA ET AL. Sup. Ct. Pa. Certiorari granted, judgments vacated, and case remanded to consider whether judgments are based on federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). MR. JUSTICE DOUGLAS dissents from the vacation and remand. Reported below: 452 Pa. 233, 304 A. 2d 432.

No. 73–5053. SCARPA *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 5th Cir. Motion to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for consideration of question of mootness. MR. JUSTICE DOUGLAS dissents. Reported below: 468 F. 2d 31 and 477 F. 2d 278.

Miscellaneous Orders

No. A–106. RAYMOND *v.* GUNN, WARDEN. Application for writ of habeas corpus presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–230. LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* PENNSYLVANIA ET AL. Motion to vacate stay of judgment of the District Court for the District of Columbia pending appeal to the Court of Appeals for the District of Columbia Circuit, entered by THE CHIEF JUSTICE on August 29, 1973, or in the alternative for an order for applicant to file a petition for writ of certiorari before judgment, denied. MR. JUSTICE DOUGLAS would vacate stay.

No. A–288. BURNS, ACTING COMMISSIONER, IOWA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* ALCALA ET AL. D. C. S. D. Iowa. Application for stay of judgment presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted pending final disposition on appeal in the United States Court of Appeals for the Eighth Circuit. MR. JUSTICE DOUGLAS would deny the application.

No. D–10. IN RE DISBARMENT OF KIRTZ. It having been reported to this Court that Frank G. Kirtz, of St. Louis, Missouri, has been disbarred from the practice of law in all of the courts of the State of Missouri, and this Court by order of June 11, 1973 [412 U. S. 936], having suspended the said Frank G. Kirtz from the practice of

law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and the United States Marshal attempted to serve respondent and said respondent refused to accept service and that the time within which to file a return has expired;

It is ordered that the said Frank G. Kirtz be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys to practice before the Bar of this Court.

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS. Exceptions to Report of Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 411 U. S. 913.]

No. 62, Orig. NEVADA *v.* CALIFORNIA. Motion for leave to file bill of complaint denied.

No. 63, Orig. GEORGIA *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. Motion for leave to file bill of complaint denied.

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Motion for leave to file bill of complaint granted. State of Maine allowed 30 days in which to answer or otherwise respond.

No. 71–1545. BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* GLOVER LIVESTOCK COMMISSION CO., INC., 411 U. S. 182. Motion to waive costs denied.

No. 72–397. BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL. Sup. Ct. Ariz. [Certiorari granted, 410 U. S. 908.] Motions of State of California and County of Mohave, Arizona, for leave to participate in oral argument as *amici curiae* denied.

No. 72–481. DEPARTMENT OF GAME OF WASHINGTON *v.* PUYALLUP TRIBE ET AL.; and

No. 72–746. PUYALLUP TRIBE *v.* DEPARTMENT OF GAME OF WASHINGTON. Sup. Ct. Wash. [Certiorari granted, 410 U. S. 981.] Motion of Ramona C. Bennett et al. for leave to file a brief as *amici curiae* in support of Puyallup Tribe granted. Motion of National Congress of American Indians, Inc., et al., for leave to file a brief as *amici curiae* in support of Puyallup Tribe in No. 72–746 granted.

No. 72–490. MCDONNELL DOUGLAS CORP. *v.* GREEN, 411 U. S. 792. Motion of respondent to retax costs denied.

No. 72–671. ESPINOZA ET VIR *v.* FARAH MANUFACTURING CO., INC. C. A. 5th Cir. [Certiorari granted, 411 U. S. 946.] Motion of Facilities Management Corp. for leave to file a brief as *amicus curiae* denied.

No. 72–777. CLEVELAND BOARD OF EDUCATION ET AL. *v.* LAFLEUR ET AL. C. A. 6th Cir.; and

No. 72–1129. COHEN *v.* CHESTERFIELD COUNTY SCHOOL BOARD ET AL. C. A. 4th Cir. Motions of American Civil Liberties Union et al., National Education Assn. et al., and International Union of Electrical Radio & Machine Workers, AFL–CIO, for leave to file briefs as *amici curiae* granted. Motion of Margaret M. Broussard for leave to file a brief as *amicus curiae* and to dispense with printing granted. Motion of International Association of Official Human Rights Agencies for leave to file a brief as *amicus curiae* in No. 72–777 granted. Motions of State of Maryland Commission on Human Relations et al., and Delta Air Lines, Inc., for leave to file briefs as *amici curiae* in No. 72–1129 granted.

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No. 72–847. MEMORIAL HOSPITAL ET AL. *v.* MARICOPA COUNTY ET AL. Appeal from Sup. Ct. Ariz. [Probable jurisdiction noted, 410 U. S. 981.] Motion of Legal Aid Society of Maricopa County, Arizona, for leave to dispense with printing *amicus curiae* brief denied.

No. 72–888. ZAHN ET AL. *v.* INTERNATIONAL PAPER Co. C. A. 2d Cir. [Certiorari granted, 410 U. S. 925.] Motions of Lloyd E. Canfield et al. and Consumers Union of the United States, Inc., for leave to file briefs as *amici curiae* denied.

No. 72–914. SCHEUER, ADMINISTRATRIX *v.* RHODES, GOVERNOR OF OHIO, ET AL.; and

No. 72–1318. KRAUSE, ADMINISTRATOR, ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. [Certiorari granted, 413 U. S. 919.] Motion of National Council of the Churches of Christ in the U. S. A. et al. for leave to file a brief as *amici curiae* granted. Motion of Kent Legal Defense Fund for leave to file a brief as *amicus curiae* in No. 72–914 denied. Motion of National Bar Assn. for leave to file a brief as *amicus curiae* in No. 72–1318 granted.

No. 72–948. NATIONAL CABLE TELEVISION ASSN., INC. *v.* UNITED STATES ET AL. C. A. 5th Cir. [Certiorari granted, 411 U. S. 981.] Motions of National Association of Broadcasters and American Telephone & Telegraph Co. et al. for leave to file briefs as *amici curiae* granted.

No. 72–953. O'SHEA, MAGISTRATE, CIRCUIT COURT OF ALEXANDER COUNTY, ILLINOIS, ET AL. *v.* LITTLETON ET AL. C. A. 7th Cir. [Certiorari granted, 411 U. S. 915.] Motion of Illinois State Bar Assn. for leave to file a brief as *amicus curiae* granted.

No. 72–1040. COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL. Appeal from D. C. N. D. Ind. [Probable jurisdiction postponed, 410 U. S. 981.] Motion of appellants for divided argument denied.

No. 72–1052. MORTON, SECRETARY OF THE INTERIOR *v.* RUIZ ET UX. C. A. 9th Cir. [Certiorari granted, 411 U. S. 947.] Motion of California Indian Legal Services for leave to participate in oral argument as *amicus curiae* denied. Motion of Arapahoe Tribe of Wyoming et al. for leave to file a brief as *amici curiae* granted.

No. 72–1180. OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. *v.* AUSTIN ET AL. Appeal from Sup. Ct. Va. [Probable jurisdiction noted, 412 U. S. 917.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 72–1289. NATIONAL RAILROAD PASSENGER CORP. ET AL. *v.* NATIONAL ASSOCIATION OF RAILROAD PASSENGERS. C. A. D. C. Cir. [Certiorari granted, 411 U. S. 981.] Motion of National Association of Regulatory Utility Commissioners for leave to file a brief as *amicus curiae* granted.

No. 72–1603. CARDWELL, WARDEN *v.* LEWIS. C. A. 6th Cir. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before November 8, 1973.

No. 72–1694. NEW YORK *v.* NEWMAN. Ct. App. N. Y. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 72–5847. ALEXANDER *v.* GARDNER-DENVER CO. C. A. 10th Cir. [Certiorari granted, 410 U. S. 925.] Motion of American Retail Federation for leave to file a brief as *amicus curiae* granted.

No. 72–6160. MITCHELL *v.* W. T. GRANT CO. Sup. Ct. La. [Certiorari granted, 411 U. S. 981.] Motion of National Consumer Law Center, Inc., for leave to file a brief as *amicus curiae* and to dispense with printing denied.

No. 73–686. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL.; and

No. 73–687. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Motion of petitioners for leave to proceed *in forma pauperis* denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 72–6281. MCMASTER *v.* CONNETT, WARDEN;

No. 72–6774. MILLER *v.* MEACHAM, WARDEN;

No. 73–5005. OLDEN *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, ET AL.;

No. 73–5083. LODDY *v.* MEACHAM, WARDEN, ET AL.; and

No. 73–5190. NEAL *v.* CALDWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–5158. HAWKINS *v.* MEACHAM, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 72–6770. DORROUGH *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 72–6771. CHACON *v.* NELSON, WARDEN;

No. 72–6821. HAYES *v.* TEHAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL.;

No. 72–6839. MAGHE *v.* GUARINO, JUDGE;

No. 72–6881. DUN LEAVAY *v.* PIERCE, U. S. DISTRICT JUDGE;

No. 72–6886. CARY *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL.;

No. 72–6890. DUN LEAVAY *v.* DUFFY, U. S. DISTRICT JUDGE;

No. 72–6895. DUN LEAVAY *v.* LIVINGSTON, CLERK, U. S. DISTRICT COURT; and

No. 72–6929. DIGGS *v.* KLINE, CLERK, U. S. COURT OF APPEALS, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 72–6996. MCLAUGHLIN ET AL. *v.* NEW YORK. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 73–28. WHITSON *v.* AGNEW, VICE PRESIDENT OF THE UNITED STATES, ET AL. Motion for leave to file petition for writ of *quo warranto* denied.

No. 72–6747. DUN LEAVAY *v.* FRIENDLY, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 72–1557. SPEIGHT, T/A HAREM BOOK STORE, ET AL. *v.* SLATON ET AL. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. Reported below: 356 F. Supp. 1101.

No. 72–1690. SPENCE *v.* WASHINGTON. Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Reported below: 81 Wash. 2d 788, 506 P. 2d 293.

No. 72–1713. SECRETARY OF THE NAVY *v.* AVRECH. Appeal from C. A. D. C. Cir. Probable jurisdiction noted. Reported below: 155 U. S. App. D. C. 352, 477 F. 2d 1237.

No. 73–157. CALERO-TOLEDO ET AL. *v.* PEARSON YACHT LEASING CO. Appeal from D. C. Puerto Rico. Probable jurisdiction noted. Reported below: 363 F. Supp. 1337.

No. 72–985. CALIFORNIA BANKERS ASSN. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL.;

No. 72–1073. SHULTZ, SECRETARY OF THE TREASURY, ET AL. *v.* CALIFORNIA BANKERS ASSN. ET AL.; and

No. 72–1196. STARK ET AL. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL. Appeals from D. C. N. D. Cal. Probable jurisdiction noted. Cases consolidated and two hours allotted for oral argument. Reported below: 347 F. Supp. 1242.

Certiorari Granted

No. 72–1382. F. D. RICH CO., INC., ET AL. *v.* UNITED STATES FOR THE USE OF INDUSTRIAL LUMBER CO., INC. C. A. 9th Cir. Certiorari granted. Reported below: 473 F. 2d 720.

No. 72–1566. GRANNY GOOSE FOODS, INC., ET AL. *v.* BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 9th Cir. Certiorari granted. Reported below: 472 F. 2d 764.

No. 72–1589. RICHARDSON, COUNTY CLERK AND REGISTRAR OF VOTERS OF MENDOCINO COUNTY *v.* RAMIREZ ET AL. Sup. Ct. Cal. Certiorari granted. Reported below: 9 Cal. 3d 199, 507 P. 2d 1345.

No. 72–1598. NATIONAL LABOR RELATIONS BOARD *v.* BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC.

C. A. 2d Cir. Certiorari granted. Reported below: 475 F. 2d 485.

No. 72–1637. NATIONAL LABOR RELATIONS BOARD *v.* MAGNAVOX COMPANY OF TENNESSEE. C. A. 6th Cir. Certiorari granted. Reported below: 474 F. 2d 1269.

No. 73–9. COMMISSIONER OF INTERNAL REVENUE *v.* NATIONAL ALFALFA DEHYDRATING & MILLING CO. C. A. 10th Cir. Certiorari granted. Reported below: 472 F. 2d 796.

No. 72–1470. BOB JONES UNIVERSITY *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL. C. A. 4th Cir. Certiorari granted and case set for oral argument with No. 72–1371 [*Walters* v. *"Americans United" Inc.*, certiorari granted, 412 U. S. 927]. Reported below: 472 F. 2d 903 and 476 F. 2d 259.

No. 72–1490. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.; and

No. 72–1491. DOUGHERTY, EXECUTOR, ET AL. *v.* TEXACO INC. ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 154 U. S. App. D. C. 168, 474 F. 2d 416.

No. 72–1554. SUPER TIRE ENGINEERING CO. ET AL. *v.* MCCORKLE ET AL. C. A. 3d Cir. Motion of Chamber of Commerce of the United States for leave to intervene denied. Certiorari granted. Reported below: 469 F. 2d 911.

No. 72–1628. TELEPROMPTER CORP. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 72–1633. COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* TELEPROMPTER CORP. ET AL. C. A. 2d Cir. Motion of National Cable Television Assn., Inc., for leave

to file a brief as *amicus curiae* in No. 72–1628 granted. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 476 F. 2d 338.

No. 73–88. UNITED STATES *v.* EDWARDS ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 474 F. 2d 1206.

No. 73–187. KEWANEE OIL CO. *v.* BICRON CORP. ET AL. C. A. 6th Cir. Motions by the following organizations for leave to file briefs as *amici curiae* are granted: American Patent Law Assn., Association for the Advancement of Invention & Innovation, Manufacturing Chemists Assn., Licensing Executives Society, Patent Law Association of Chicago, American Bar Assn., New York Patent Law Assn., and SCM Corp. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 478 F. 2d 1074.

Certiorari Denied. (See also Nos. 72–1155, 6413, 6628, 6757, 6832, 6900, and 6932; and 73–138, 213, and 5019, *supra.*)

No. 72–1217. RICHARDSON *v.* COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 469 F. 2d 333.

No. 72–1339. INSURANCE COMPANY OF NORTH AMERICA *v.* WISE ET AL.; and

No. 72–6477. DA'VILLE, TUTRIX *v.* WISE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 1364.

No. 72–1385. JEFFERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 268.

No. 72–1391. SCALISE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1351.

No. 72–1392. BOYCE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–1393. CROCKARELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–1394. BILLINGSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 63.

No. 72–1395. GRIFFIN & BRAND OF MCALLEN, INC. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 235.

No. 72–1398. LITTLEFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–1401. BALAX, INC., ET AL. *v.* BENDIX CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 149.

No. 72–1407. HENNINGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 814.

No. 72–1411. JENNINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 999.

No. 72–1412. NEWTON ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 72–1423. CAMPOPIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: See 446 F. 2d 869.

No. 72–1427. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 962.

No. 72–1429. BOOZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: See 451 F. 2d 719.

No. 72–1432. ACOSTA *v.* UNITED STATES;

No. 72–1455. FERNANDEZ ET AL. *v.* UNITED STATES; and

No. 72–1600. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 740 and 473 F. 2d 662.

No. 72–1441. PHILLIPS *v.* UNITED STATES; and

No. 72–6925. YOCKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1351.

No. 72–1445. SONDEREGGER *v.* SAGITTARIUS PRODUCTIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–1449. UNIVERSITY OF NEVADA ET AL. *v.* HALL ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 3d 522, 503 P. 2d 1363.

No. 72–1457. CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 72–1460. RIGGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 699.

No. 72–1461. HARKNESS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 199 Ct. Cl. 721, 469 F. 2d 310.

No. 72–1463. JONES *v.* THRIFT FUNDS OF BATON ROUGE, INC. Sup. Ct. La. Certiorari denied. Reported below: 274 So. 2d 150.

No. 72–1469. LAVELLE *v.* UNITED STATES; and

No. 72–1575. THALER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 475 F. 2d 270.

No. 72–1478. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 1027.

No. 72–1479. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* UNITED STATES TREASURY DEPARTMENT ET AL. C. C. P. A. Certiorari denied.

No. 72–1480. GLENN W. TURNER ENTERPRISES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 476.

No. 72–1481. COX *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–1482. BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 509.

No. 72–1483. HELLWIG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–1486. GULLO *v.* ROBINSON, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied.

No. 72–1492. CARMONA *v.* MOORE-McCORMACK LINES, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 760, 336 N. Y. S. 2d 1004.

No. 72–1493. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 688.

No. 72–1494. UNITED STATES *v.* 100 ACRES IN MARIN COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 1261.

No. 72–1497. WISCONSIN BEARING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied.

No. 72–1500. GENERAL ELECTRIC CO. *v.* LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 751.

No. 72–1501. J. H. RUTTER REX MANUFACTURING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 223.

No. 72–1505. BEHRENS DRUG CO. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1041.

No. 72–1507. LUKAS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: — Del. —, 303 A. 2d 664.

No. 72–1514. STERR *v.* KELLY. Sup. Ct. N. J. Certiorari denied. Reported below: 62 N. J. 105, 299 A. 2d 390.

No. 72–1515. FARRELL LINES, INC. *v.* RIVERA. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 255.

No. 72–1516. PARKER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–1518. ROSE HILLS MEMORIAL PARK ASSN. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 199 Ct. Cl. 6, 463 F. 2d 425.

No. 72–1520. BURROUGHS ET AL. *v.* STERLING TRANSIT CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–1522. CHARMAR INVESTMENT CO. *v.* CITY NATIONAL BANK & TRUST CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 475 F. 2d 560.

No. 72–1523. PRICE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 72–1525. SUNDRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–1526. COULTER ET AL. *v.* MELADY ET AL. Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 489 S. W. 2d 156.

No. 72–1527. BROWN *v.* UNITED STATES;
No. 72–1531. NASH *v.* UNITED STATES;
No. 72–6486. BOULIER *v.* UNITED STATES; and
No. 72–6497. NATHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 476 F. 2d 456.

No. 72–1528. MIDWEST HANGER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 474 F. 2d 1155.

No. 72–1529. UNITED STATES *v.* DOWDY. C. A. 4th Cir. Certiorari denied. Reported below: 479 F. 2d 213.

No. 72–1530. DUGAS *v.* KANSAS CITY SOUTHERN RAILWAY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 821.

No. 72–1532. PETERSON *v.* STANCZAK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1350.

No. 72–1553. H. HENTZ & CO. ET AL. *v.* KASNER ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 119.

No. 72–1534. D. S. BROWN CO. ET AL. *v.* ACME HIGHWAY PRODUCTS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 849.

No. 72–1537. KERSHAW *v.* BROOKS ET AL.;

No. 72–1650. CONCERNED PARENTS ASSN. ET AL. *v.* BROOKS ET AL.; and

No. 73–82. CARDEN *v.* BROOKS ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–1538. BANK OF CAMILLA *v.* COLUMBIAN PEANUT CO. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 476.

No. 72–1539. HOPE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 72–1651. COMMISSIONER OF INTERNAL REVENUE *v.* HOPE ET UX. C. A. 3rd Cir. Certiorari denied. Reported below: 471 F. 2d 738.

No. 72–1541. SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied.

No. 72–1542. HARDY, ACTING WARDEN *v.* VUITCH. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 1370.

No. 72–1544. H. L. H. ENTERPRISES, INC., ET AL. *v.* MCGREGOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 188.

No. 72–1545. BARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–1547. MOHAN ET AL. *v.* KERR. C. A. 7th Cir. Certiorari denied.

No. 72–1548. SCHECHTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1099.

No. 72–1549. THOMPSON *v.* GROSHENS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 127.

No. 72–1551. STROM *v.* STROM. C. A. 8th Cir. Certiorari denied.

No. 72–1552. EDELSTEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–1553. MULLIGAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–1555. GODFROY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 198 Ct. Cl. 1, 199 Ct. Cl. 487, and 200 Ct. Cl. 728, 458 F. 2d 93, 467 F. 2d 909, and 473 F. 2d 892.

No. 72–1556. ECHOLS, AKA PAGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 37.

No. 72–1559. HERTZ CORP. *v.* COX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 552.

No. 72–1560. NATIONAL FAMILY INSURANCE CO. *v.* EXCHANGE NATIONAL BANK OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 237.

No. 72–1563. WAITE ET AL. *v.* F. P. PLAZA, INC., ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 230 Ga. 161, 196 S. E. 2d 141.

No. 72–1564. BERNABEI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 1385.

No. 72–1567. JANSEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 312.

No. 72–1569. GLEN MANOR HOME FOR THE JEWISH AGED *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1145.

No. 72–1574. BOB LAWRENCE REALTY, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 115.

No. 72–1577. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 475 F. 2d 1401.

No. 72–1579. MIELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–1580. PORTH *v.* WARDEN, NORTH CAROLINA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 72–1581. BYRON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 1405.

No. 72–1583. HATTON, DBA AIR CONTROL ENGINEERING CO. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 9.

No. 72–1585. HOOVER, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1050.

No. 72–1587. GAZZOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–1590. KUSTOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 1405.

No. 72–1591. CITY OF BELLEVUE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 474 F. 2d 473.

No. 72–1593. LABEL, INC. *v.* COMMISSIONER, FOOD AND DRUG ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–1595. COX ET AL. *v.* WALTER E. HELLER & Co., INC. C. A. 2d Cir. Certiorari denied. Reported below: See 343 F. Supp. 519.

No. 72–1596. SIX FLAGS OVER GEORGIA, LTD., ET AL. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 18.

No. 72–1599. RICCARDI *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied. Reported below: 73 Misc. 2d 19, 340 N. Y. S. 2d 996.

No. 72–1601. N. C. FREED Co., INC. *v.* BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 473 F. 2d 1210.

No. 72–1608. GITMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 907.

No. 72–1609. INTERNATIONAL PAPER Co. *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 271 So. 2d 395.

No. 72–1610. GREENSPHAN *v.* UNITED STATES;
No. 73–39. GEORGE *v.* UNITED STATES; and
No. 73–61. YONAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 2d 508.

No. 72–1611. TUCKER *v.* NEAL. C. A. 9th Cir. Certiorari denied.

No. 72–1618. GIMELSTOB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 157.

No. 72–1620. MOSS *v.* O'DONNELL, ADMINISTRATRIX, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 428.

No. 72–1623. BOOTHE *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 790.

No. 72–1629. BLUETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–1632. WRIGHT ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 72–1634. DESERT OUTDOOR ADVERTISING, INC., ET AL. *v.* CITY OF ESCONDIDO. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 3d 785, 505 P. 2d 1012.

No. 72–1635. OHIO CASUALTY GROUP *v.* PARRISH ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 260 So. 2d 550.

No. 72–1636. MCCOY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 478 F. 2d 176.

No. 72–1639. BABICH ET AL. *v.* UNITED STATES; and
No. 72–1654. SPANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 2d 242.

No. 72–1640. STANDARD EDUCATORS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 290, 475 F. 2d 401.

No. 72–1643. CONTINENTAL CASUALTY CO. *v.* J. G. LINK & CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 1133.

No. 72–1644. IMPACT DIE CASTING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied.

No. 72–1645. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1385.

No. 72–1647. MOBIL OIL CORP. ET AL. *v.* STANDARD INDUSTRIES, INC., ET AL.;

No. 72–1663. SUNRAY-DX OIL CO. *v.* STANDARD INDUSTRIES, INC., ET AL.; and

No. 72–1689. STANDARD INDUSTRIES, INC., ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 475 F. 2d 220.

No. 72–1655. PARKER SWEEPER CO. *v.* E. T. RUGG CO. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 950.

No. 72–1656. TENNENBAUM ET AL. *v.* TENNENBAUM ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 72–1658. C & M PETROLEUM PRODUCERS, INC., ET AL. *v.* MEYERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 427.

No. 72–1666. PARAMOUNT FILM DISTRIBUTING CORP. *v.* NEW YORK. Ct. Cl. N. Y. Certiorari denied. Reported below: See 30 N. Y. 2d 415, 285 N. E. 2d 695.

No. 72–1667. KRODEL *v.* HOUGHTALING ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 887.

No. 72–1668. SHIOSAKI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 770.

No. 72–1672. ALMADEN VOLKSWAGEN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 72–1673. DENNY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 49 Ala. App. 621, 274 So. 2d 650.

No. 72–1674. COX ET AL. *v.* BLACKMON ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 230 Ga. 275, 196 S. E. 2d 403.

No. 72–1677. LEE *v.* BROWN. Sup. Ct. Ore. Certiorari denied. Reported below: 264 Ore. 341, 505 P. 2d 924.

No. 72–1683. BENJAMIN *v.* WESTERN BOAT BUILDING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 723.

No. 72–1685. OWEN *v.* OWEN. Sup. Ct. Mich. Certiorari denied. Reported below: 389 Mich. 117, 205 N. W. 2d 181.

No. 72–1686. DIANOVIN PHARMACEUTICALS, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 475 F. 2d 100.

No. 72–1687. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 476 F. 2d 667.

No. 72–1692. D. D. I., INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 199 Ct. Cl. 380, 467 F. 2d 497.

No. 72–1693. BRIGHAM ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 68, 470 F. 2d 571.

No. 72–1695. DAVIES *v.* JUDGES OF THE U. S. COURT OF MILITARY APPEALS ET AL. C. A. 1st Cir. Certiorari denied.

No. 72–1696. GREAT LAKES CAR DISTRIBUTORS, INC. *v.* KIBSGARD SPORTS CAR CENTER, INC. C. A. 6th Cir. Certiorari denied.

No. 72–1697. SHAFER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–1700. HARMASH ET AL. *v.* UNITED STATES; and No. 72–1730. KIFFER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 477 F. 2d 349.

No. 72–1702. GUEST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 72–1705. CARINI *v.* ZONING BOARD OF APPEALS OF THE TOWN OF WEST HARTFORD. Sup. Ct. Conn. Certiorari denied.

No. 72–1708. KELLEMS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 1399.

No. 72–1710. WASHINGTON THEATER CLUB, INC. *v.* DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE, PROPERTY ASSESSMENT DIVISION. Ct. App. D. C. Certiorari denied. Reported below: See 302 A. 2d 231.

No. 72–1722. DUNHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1241.

No. 72–1723. ALVAREZ-FRANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–1725. PENNSYLVANIA TRANSFER COMPANY OF PHILADELPHIA, INC. *v.* WHINSTON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 72–1726. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 386, 292 N. E. 2d 667.

No. 72–1732. CENTER SCHOOL DISTRICT No. 58 ET AL. *v.* GIERINGER. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 1164.

No. 72–1739. SCHROEDER ET UX. *v.* TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 8 Ill. App. 3d 122, 289 N. E. 2d 247.

No. 72–6428. ROBERTS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 210 Kan. 786, 504 P. 2d 242.

No. 72–6430. RECOR *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6434. REESE, ADMINISTRATOR *v.* CITY OF SEATTLE ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 374, 503 P. 2d 64.

No. 72–6473. TULL *v.* WARDEN, MARYLAND PENITENTIARY. Ct. App. Md. Certiorari denied.

No. 72–6480. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6484. ANDREWS *v.* RANSDELL. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1341.

No. 72–6492. KARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1406.

No. 72–6504. RAINEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1407.

No. 72–6505. BRAXTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1407.

No. 72–6510. GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 491 S. W. 2d 669.

No. 72–6514. ELLIS *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–6515. COULTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 1004.

No. 72–6519. AGRAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 474 F. 2d 262.

No. 72–6522. COCHRAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 475 F. 2d 1080.

No. 72–6527. ODES *v.* DOPPELT ET AL. Sup. Ct. Ill. Certiorari denied.

No. 72–6530. WHITE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1407.

No. 72–6531. MURPHY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 72–6533. BEESON *v.* KASSOS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 2d 656.

No. 72–6540. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6547. MUISE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–6548. TYNDALL ET AL. *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 2d 52.

No. 72–6550. WOLFE *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–6552. MCPHATTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 1356.

No. 72–6560. SPRUILL ET AL. *v.* UNITED STATES; and No. 72–6947. GRAY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–6561. RODRIQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 651.

No. 72–6562. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 1336.

No. 72–6563. SATTERFIELD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 911.

No. 72–6564. JENKINS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 651.

No. 72–6565. ALVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–6569. ROSE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 7 Wash. App. 176, 498 P. 2d 897.

No. 72–6570. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 906.

No. 72–6579. STEWART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6582. LYONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–6587. MAYES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 651.

No. 72–6588. BURTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 475 F. 2d 469.

No. 72–6591. LEBOULANGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 1273.

No. 72–6592. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1351.

No. 72–6594. GAMBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 912.

No. 72–6596. DAPPER *v.* O'CONNOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–6597. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 300.

No. 72–6602. STEELE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 597.

No. 72–6604. MALLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 271 So. 2d 448.

No. 72–6605. WALTER, AKA WALTERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6610. DAUGHERTY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6614. ROZEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 1397.

No. 72–6615. ALBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6616. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 615.

No. 72–6617. VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 730.

No. 72–6620. LAWRENCE *v.* STONE, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 72–6621. KALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–6624. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6626. ODOM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 1397.

No. 72–6627. RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 624.

No. 72–6631. COLEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 282 N. C. 552, 193 S. E. 2d 725.

No. 72–6632. DAVIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 449 Pa. 468, 297 A. 2d 817.

No. 72–6637. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 474 F. 2d 1337.

No. 72–6639. SWINDLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 476 F. 2d 167.

No. 72–6645. WEBB *v.* PORTER ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–6646. FUNGONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6648. JEFFRIES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1351.

No. 72–6649. MOORE, AKA MCNESS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: See 441 F. 2d 746.

No. 72–6650. THACKER *v.* BLACK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6651. SKINNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1349.

No. 72–6652. FERGUSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–6653. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1407.

No. 72–6654. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6655. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6658. FREEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6663. BOYDEN *v.* UNITED STATES; and
No. 72–6882. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6665. CAUDILL ET AL. *v.* PICKETT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–6667. WRIGHT *v.* PERINI, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 911.

No. 72–6670. WOJCIECHOWSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6671. BROWN *v.* NEW JERSEY STATE PAROLE BOARD. Super. Ct. N. J. Certiorari denied.

No. 72–6672. VAN ACKEREN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 189 Neb. 639, 204 N. W. 2d 165.

No. 72–6675. LEAMER *v.* DERAMUS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 72–6678. ASSENZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–6680. MORRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6683. HAWKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 307, 475 F. 2d 418.

No. 72–6685. DRISCOLL *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6686. HILL *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 72–6687. LOPEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 537.

No. 72–6692. ECKERT *v.* CITY OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied. Reported below: 477 F. 2d 610.

No. 72–6693. TROPEANO *v.* UNITED STATES; and
No. 72–6694. MALONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: No. 72–6693, 476 F. 2d 586.

No. 72–6695. GALARDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 1072.

No. 72–6696. GUFFEY *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–6697. WILLIAMS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6698. BURTON *v.* HASKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6700. MULLINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 476 F. 2d 664.

No. 72–6701. GRISSAM *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–6702. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6703. JENSEN *v.* REEPLOEG ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 541, 503 P. 2d 99.

No. 72–6704. DILLARD *v.* NEW YORK CITY TRANSIT AUTHORITY. Ct. App. N. Y. Certiorari denied.

No. 72–6705. BEASLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 164.

No. 72–6706. CROSS ET AL. *v.* STANFORD UNIVERSITY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–6707. HARRINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6708. DAVIS *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 72–6709. HAYES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–6716. INGRAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 2d 236.

No. 72–6717. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 44.

No. 72–6718. GRAY *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–6719. DEATON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 65.

No. 72–6722. KAMINER ET AL. *v.* FRANKLIN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1073.

No. 72–6724. DOMENECH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 476 F. 2d 1229.

No. 72–6728. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 64.

No. 72–6729. PROGER, AKA PRAGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6730. RILEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 298 A. 2d 228.

No. 72–6731. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 723.

No. 72–6732. FLORES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 477 F. 2d 608.

No. 72–6733. KEARNS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 211 Kan. 158, 505 P. 2d 676.

No. 72–6735. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 268 So. 2d 2.

No. 72–6736. HAVEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6737. RODRIGUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6739. GALLARDO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6740. BALSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6741. GRASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–6743. KINDRED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6751. MANGABAT *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 2d 108.

No. 72–6752. CASAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–6754. STARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 72–6755. BARTLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6759. GAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied.

No. 72–6760. KENNEDY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–6761. JOHNSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1402.

No. 72–6762. SMILGUS *v.* BERGMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–6763. ALBRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6765. RICO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 1405.

No. 72–6766. CARLTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 104.

No. 72–6767. COLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–6768. ALLEN *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Ct. Sp. App. Md. Certiorari denied.

No. 72–6769. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6775. VITTA *v.* UNITED STATES; and
No. 72–6827. CANGIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6776. HAMILTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6779. BANGOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6780. FERRARI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 510.

No. 72–6781. LASSITER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 35, 193 S. E. 2d 265.

No. 72–6782. HARPER *v.* TEGTMEYER, ACTING COMMISSIONER OF PATENTS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–6783. CLAYTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 89.

No. 72–6786. SACASAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6788. WILKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 323.

No. 72–6789. GOMEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 774.

No. 72–6790. SMILGUS *v.* LETTS, JUDGE. C. A. 6th Cir. Certiorari denied.

No. 72–6792. ECKERT *v.* UNITED STATES DEPARTMENT OF THE TREASURY ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6793. RICHARDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 1280.

No. 72–6795. BUTLER *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 72–6796. HAWKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 72–6797. KOSKY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 72–6798. GERNAND *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 747.

No. 72–6801. BLECKLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1225.

No. 72–6802. PORTER *v.* BLOOMSBURG STATE COLLEGE ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 450 Pa. 375, 301 A. 2d 621.

No. 72–6803. PORTER *v.* NOSSEN. Super. Ct. Pa. Certiorari denied.

No. 72–6804. KERR *v.* BORTHWICK. C. A. D. C. Cir. Certiorari denied.

No. 72–6805. WHITE *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6806. PUCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 476 F. 2d 1099.

No. 72–6807. POLK *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–6809. HAMMONDS *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 72–6810. DULLES ET AL. *v.* FIDUCIARY TRUST CO. C. A. D. C. Cir. Certiorari denied.

No. 72–6811. EDMUNSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6813. SPIRES *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–6814. GLASGOW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 478 F. 2d 850.

No. 72–6815. POE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 195.

No. 72–6816. STITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 479 F. 2d 315.

No. 72–6817. FOUNTAIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6819. KAYE *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6824. ALLEN *v.* UNITED STATES; and
No. 72–6825. O'BRIEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6826. NYHAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–6828. LUNA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 95.

No. 72–6829. MCMINN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 599.

No. 72–6830. PACE *v.* CAMPBELL ET AL. C. A. 1st Cir. Certiorari denied.

No. 72–6831. CRAWFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1352.

No. 72–6833. TIDD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6835. BLASETTI *v.* GAGLIARDI ET AL. C. A. 2d Cir. Certiorari denied.

No. 72–6837. JOSEPH *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied.

No. 72–6838. WISE *v.* BRITTON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 72–6841. PEREZ-ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6842. JOHNSON *v.* DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6843. BRAGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 598.

No. 72–6844. JENKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6845. PETERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 806.

No. 72–6848. BROWN *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6849. LIGHT ET AL. *v.* UNITED STATES C. A. 9th Cir. Certiorari denied. Reported below: 478 F. 2d 494.

No. 72–6850. LITTLE *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 2d 767.

No. 72–6852. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 597.

No. 72–6853. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6854. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 913.

No. 72–6855. CHAN KAM-SHU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–6860. COLLINGWOOD *v.* MEACHAM, WARDEN. Sup. Ct. Wyo. Certiorari denied.

No. 72–6861. REDFORD *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 72–6862. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6863. LINDSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6864. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6866. KETOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 478 F. 2d 64.

No. 72–6867. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 383.

No. 72–6868. WILLIAMS *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 72–6869. SIMPSON *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1407.

No. 72–6870. ARNOLD *v.* BUFFAT ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–6873. NEWELL *v.* HARRIS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 72–6875. OLDEN *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 693.

No. 72–6876. LARKIN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 212 Kan. 158, 510 P. 2d 123.

No. 72–6877. SERRANO-BUGARIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6878. PERKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6884. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 924.

No. 72–6885. PAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1406.

No. 72–6887. ROLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 97.

No. 72–6888. BOATNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 737.

No. 72–6889. NELSON ET AL. *v.* JAMAICA BUSES, INC. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 72–6891. SHINDER *v.* ESMIOL. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 72–6893. BAILEY *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1273.

No. 72–6894. ENDRES *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 72–6896. JEFFERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 477 F. 2d 593.

No. 72–6898. SCHARTNER *v.* PIZZO, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6899. CREIGHTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 477 F. 2d 593.

No. 72–6901. POLK *v.* CALIFORNIA. Ct. App. Cal. 1st App. Dist. Certiorari denied.

No. 72–6903. MOSS *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–6904. FROGGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 969.

No. 72–6907. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 595.

No. 72–6909. BILELLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 922, 293 N. E. 2d 92.

No. 72–6910. HALEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 478 F. 2d 766.

No. 72–6911. WALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 72–6912. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6913. WHITESIDE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1346.

No. 72–6920. COLLINS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 988.

No. 72–6922. LARUEA *v.* MARTHA WASHINGTON ASSOCIATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 72–6923. MILLER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 72–6926. ROSS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1150.

No. 72–6928. HART *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 72–6935. WHITED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6936. FARKAS *v.* LING-TEMCO-VOUGHT, INC. C. A. 1st Cir. Certiorari denied.

No. 72–6937. FEROLDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6938. INDIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 230, 298 N. E. 2d 65.

No. 72–6939. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6940. HUNT, AKA REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 478 F. 2d 357.

No. 72–6942. DUN LEAVAY *v.* LUTZ APPELLATE PRINTERS, INC. C. A. 2d Cir. Certiorari denied.

No. 72–6943. DIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 72–6944. HARDWICK *v.* DURDEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 651.

No. 72–6945. HARRIS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 46, 194 S. E. 2d 796.

No. 72–6946. SHERMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–6948. JARRETT *v.* SCOTT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–6949. AMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6953. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 1315.

No. 72–6954. AVERITT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 1009.

No. 72–6955. COPPOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6957. GRILLS *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 72–6958. GARDNER *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 85 N. M. 104, 509 P. 2d 871.

No. 72–6959. WATKINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–6960. THUNDERSHIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 478 F. 2d 241.

No. 72–6961. GAMMON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6962. MCCARTHNEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–6963. SCARPA *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 72–6964. CLARK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 30 Cal. App. 3d 549, 106 Cal. Rptr. 147.

No. 72–6965. SLOAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6966. MORRIS, AKA JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 657.

No. 72–6968. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 1251.

No. 72–6969. MENDES *v.* REA EXPRESS, INC. C. A. 2d Cir. Certiorari denied.

No. 72–6970. DENMAN ET AL. *v.* BERKMAN. C. A. 6th Cir. Certiorari denied.

No. 72–6972. CIMMINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1362.

No. 72–6973. SOOTS ET UX. *v.* CONNER. Sup. Ct. Del. Certiorari denied.

No. 72–6974. WATSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6975. HESTER *v.* VETERANS' ADMINISTRATION CENTER ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6977. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6978. TORRES *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 555.

No. 72–6980. HARPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6981. DE LEON *v.* UNITED STATES; and
No. 73–5018. DE LEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 170 and 474 F. 2d 790.

No. 72–6982. MCCRAY *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 256.

No. 72–6983. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6985. REED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6986. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6987. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6989. WRIGHT *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 349.

No. 72–6990. HERN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6993. KELLY *v.* PERINI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6997. HOWELL *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6998. DIAZ-AGUILAR ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 72–6999. CARROLL *v.* CITY OF MIAMI ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–2. KAEHNI ET AL. *v.* DIFFRACTION CO. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 908.

No. 73–12. LIBERTY MUTUAL INSURANCE CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 579.

No. 73–17. MOGULNICKI *v.* CONNECTICUT. C. A. 2d Cir. Certiorari denied.

No. 73–18. ARLINGTON HOTEL CO., INC. *v.* REED. C. A. 8th Cir. Certiorari denied. Reported below: 476 F. 2d 721.

No. 73–20. ARONSON ET AL. *v.* AMBROSE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 479 F. 2d 75.

No. 73–21. GRUBBS, DBA T. R. GRUBBS TIRE & APPLIANCE *v.* GENERAL ELECTRIC CREDIT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 53.

No. 73–22. STERLING OIL OF OKLAHOMA, INC., ET AL. *v.* CHAMBERLAIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 149.

No. 73–23. FLYNN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 481 F. 2d 11.

No. 73–24. GREENWALD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 2d 320.

No. 73–27. MURRAY ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: See 192 Ct. Cl. 63, 426 F. 2d 376.

No. 73–30. SOLOMON *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 1397.

No. 73–31. YEAGER, PRINCIPAL KEEPER *v.* MACON. C. A. 3d Cir. Certiorari denied. Reported below: 476 F. 2d 613.

No. 73–35. FAIR LAWN EDUCATION ASSN. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 63 N. J. 112, 305 A. 2d 72.

No. 73–36. FREEHOLD REGIONAL HIGH SCHOOL EDUCATION ASSN. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 73–43. SOBIEK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 30 Cal. App. 3d 458, 106 Cal. Rptr. 519.

No. 73–45. WILSON BUILDING, INC. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1090.

No. 73–48. KAISER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 1406.

No. 73–49. SULLIVAN ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–53. LASORSA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 480 F. 2d 522.

No. 73–54. DONELON ET AL. *v.* NEW ORLEANS TERMINAL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1108.

No. 73–57. BLAKEWAY ET AL. *v.* SOUTHERN NATIONAL BANK OF HOUSTON. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 487 S. W. 2d 234.

No. 73–58. SENAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 2d 304.

No. 73–59. AMERICAN FAMILY MUTUAL INSURANCE CO. *v.* LUKE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 476 F. 2d 1015.

No. 73–60. P. G. BERLAND PAINT CITY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied.

No. 73–63. YOUNG *v.* CLEAR LAKE YACHT BASIN, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–68. NEW JERSEY *v.* KAISER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 476 F. 2d 610.

No. 73–70. MONTANA *v.* GLICK ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 509 P. 2d 1.

No. 73–71. WARREN *v.* ROSENTHAL, EXECUTRIX. C. A. 2d Cir. Certiorari denied. Reported below: 475 F. 2d 438.

No. 73–77. ROTHBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 480 F. 2d 534.

No. 73–83. GALARDI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 1072.

No. 73–84. WALKER *v.* BRENNAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 292.

No. 73–86. POWERS *v.* BETHLEHEM STEEL CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 477 F. 2d 643.

No. 73–92. COHEN ET AL., EXECUTORS *v.* FRANCHARD CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 115.

No. 73–95. SATKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–97. DE IBERN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1405.

No. 73–99. IN RE KAUFFMAN MUTUAL FUND ACTIONS (JOSEPH B. KAUFFMAN, PETITIONER). C. A. 1st Cir. Certiorari denied. Reported below: 479 F. 2d 257.

No. 73–100. J. O. JOHNSON, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 315, 476 F. 2d 1337.

No. 73–101. HUNTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1019.

No. 73–105. SUPERIOR PINE PRODUCTS CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 455.

No. 73–106. HANSEN *v.* UNITED CALIFORNIA BANK. C. A. 9th Cir. Certiorari denied.

No. 73–108. STASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 73–111. GENERAL AMERICAN LIFE INSURANCE CO. *v.* LOHMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 478 F. 2d 719.

No. 73–113. BUTTOLPH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 204 N. W. 2d 824.

No. 73–114. ARMSTRONG *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 203 N. W. 2d 269.

No. 73–117. IKARD ET AL. *v.* ESTATE OF WYCHE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1406.

No. 73–119. TRUSTEES OF BECK INDUSTRIES, INC. *v.* FELDMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 479 F. 2d 410.

No. 73–124. ALKIRE ET AL. *v.* CASHMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–125. ALBERT ET AL. *v.* CHEMICAL LEAMAN TANK LINES, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–129. GRINNELL CORP. *v.* HACKETT, DIRECTOR, DEPARTMENT OF EMPLOYMENT SECURITY OF RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 475 F. 2d 449.

No. 73–132. FRANKLIN ET UX. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 490 S. W. 2d 148.

No. 73–135. KING NUT CO. *v.* BEER NUTS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 326.

No. 73–137. RICE ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 479 F. 2d 58.

No. 73–139. CHEVRON CHEMICAL COMPANY, ORONITE DIVISION *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 361.

No. 73–141. SOUTHLAND MANUFACTURING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 303, 475 F. 2d 414.

No. 73–158. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* DUNCAN. C. A. 8th Cir. Certiorari denied. Reported below: 480 F. 2d 79.

No. 73–159. GRIFFIN ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 478 F. 2d 1118.

No. 73–160. REEDER, DBA NUTRIFOODS CO. *v.* H & J FOODS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 2d 1053.

No. 73–167. GRAFF VENDING CO. ET AL. *v.* HAMPTON, DBA HAMPTON VENDING SUPPLY. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 527.

No. 73–176. ARTHREE, INC., ET AL. *v.* KASKEL ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 269 So. 2d 699.

No. 73–189. SMITH *v.* KENTUCKY STATE BAR ASSN. Ct. App. Ky. Certiorari denied. Reported below: 492 S. W. 2d 880.

No. 73–194. FUHRMAN, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 2d 489.

No. 73–207. WAHL ET AL. *v.* VIBRANETICS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 971.

No. 73–209. DESMARAIS ET AL. *v.* WACHUSETT REGIONAL SCHOOL DISTRICT ET AL. Ct. App. Mass. Certiorari denied. Reported below: See —— Mass. ——, 276 N. E. 2d 691.

No. 73–218. INDIANA WAR MEMORIALS COMMISSION *v.* INDIANA CIVIL LIBERTIES UNION, INC. Sup. Ct. Ind.

Certiorari denied. Reported below: —— Ind. ——, 291 N. E. 2d 888.

No. 73–223. S. E. NICHOLS SHILLINGTON CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied.

No. 73–239. SMITH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 73–243. TRAP ROCK INDUSTRIES, INC. *v.* KOHL, COMMISSIONER OF TRANSPORTATION. Sup. Ct. N. J. Certiorari denied. Reported below: 63 N. J. 1, 304 A. 2d 193.

No. 73–246. MAKENS ET AL. *v.* FAIRFIELD PRODUCTS, INC. C. A. 8th Cir. Certiorari denied.

No. 73–281. BARON *v.* BARON. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5001. MEDLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 475 F. 2d 1401.

No. 73–5003. BYRD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5006. JACOBS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 190 Neb. 4, 205 N. W. 2d 662.

No. 73–5008. FRANCISCO *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5010. MCGRATH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 595.

No. 73–5014. BIRCH *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5017. BRADLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5020. BROWN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 491 S. W. 2d 897.

No. 73–5022. RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5026. HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1049.

No. 73–5027. CHAVARRI-ALVA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–5030. COBBS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 73–5031. ONISKOR *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 29 Utah 2d 395, 510 P. 2d 929.

No. 73–5033. WHITE *v.* PADGETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 79.

No. 73–5034. LANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 2d 1134.

No. 73–5036. MOORE *v.* MCCLELLAN, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5064. RODRIGUEZ *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 73–5067. WILLIAMS *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5070. ROSS *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5071. HOLLEY *v.* LAWRENCE. C. A. 5th Cir. Certiorari denied.

No. 73–5076. BROWN *v.* LaVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 73–5081. HOGAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 594.

No. 73–5084. DIXON *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–5086. WHETTON *v.* TURNER, WARDEN. Sup. Ct. Utah. Certiorari denied. Reported below: 28 Utah 2d 47, 497 P. 2d 856.

No. 73–5088. COX *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 491 S. W. 2d 834.

No. 73–5099. SHIPP *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 73–5109. SPIERS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 73–5112. SAUNDERS *v.* MUNICIPAL COURT, CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5122. TINSLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 73–5125. MAHONE *v.* HUBBART ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–5133. MARTINEZ *v.* OSWALD, COMMISSIONER OF CORRECTIONS, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5138. HOWARD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 73–5153. SANDERS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 1282.

No. 73–5156. LEVENTHAL *v.* FORTE ET AL. C. A. 1st Cir. Certiorari denied.

No. 73–5157. ROOTS *v.* KOON, DEPUTY SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–5161. WEBB *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 19 Ariz. App. 73, 504 P. 2d 1296.

No. 73–5163. CREASON *v.* NORTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5168. RANDOLPH *v.* ARIZONA BOARD OF REGENTS. Ct. App. Ariz. Certiorari denied. Reported below: 19 Ariz. App. 121, 505 P. 2d 559.

No. 73–5173. HANKS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5178. DOTSEY BY JOHNSON, EXECUTOR *v.* MACIAS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5180. STUCK *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 73–5185. FERGUSON *v.* TUCKER, JUDGE. C. A. 4th Cir. Certiorari denied.

No. 72–1002. CALIFORNIA *v.* TAYLOR. Sup. Ct. Cal. Motion to dispense with printing respondent's brief granted. Certiorari denied. Reported below: 8 Cal. 3d 174, 501 P. 2d 918.

No. 72–1201. 100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, CALIFORNIA, DRAKE'S BEACH ESTATES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 1261.

No. 72–1213. BUTLER *v.* UNITED STATES;

No. 72–1356. BUTLER *v.* UNITED STATES;

No. 72–6535. RODRIGUEZ *v.* UNITED STATES; and

No. 72–6538. ARIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 1.

No. 72–1301. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1307. GERVATO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 40.

No. 72–1333. CORSON ET AL. *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1378. CHRISTIAN ECHOES NATIONAL MINISTRY, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 849.

No. 72–1453. BEILENSON *v.* TREASURER OF THE UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 1077.

No. 72–1458. CLEMENT ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 776.

No. 72–1472. NOOTER CORP. *v.* WILSON ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 497.

No. 72–1488. EBERHARDT ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1496. MADERA *v.* BROOKLYN BAR ASSN. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 31 N. Y. 2d 875.

No. 72–1512. JOHNSON *v.* GARTLAN ET UX. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 1104.

No. 72–1521. SICILIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 308.

No. 72–1536. BRUNNER & LAY, INC. *v.* INGERSOLL-RAND CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 491.

No. 72–1546. MOORE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 S. W. 2d 516.

No. 72–1561. PARADISE PALMS COMMUNITY ASSN. *v.* PARADISE HOMES ET AL. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Nev. ——, 505 P. 2d 596.

No. 72–1562. BURAS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 458 F. 2d 346.

No. 72–1584. DOWDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 213.

No. 72–1592. BIDDY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 277 So. 2d 115.

No. 72–1606. MICELI *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1234.

No. 72–1615. BRENNAN, SECRETARY OF LABOR *v.* ROBERT HALL CLOTHES, INC., ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 589.

No. 72–1625. ALL ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 17 N. C. App. 284, 193 S. E. 2d 770.

No. 72–1638. CRAVEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 1329.

No. 72–1664. ABIODUN ET AL. *v.* MARTIN OIL SERVICE, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 142.

No. 72–1665. JENKINS *v.* UNITED STATES POST OFFICE ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1256.

No. 72–1703. TORTORELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 764.

No. 72–1707. INTERNATIONAL WIRE *v.* LOCAL 38, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1078.

No. 72–1711. BASSETT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 290 Ala. 259, 275 So. 2d 720.

No. 72–1712. IN RE HOROWITZ. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 72.

No. 72–1715. DEAKTOR ET AL. *v.* FOX GROCERY CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1112.

No. 72–1717. RIZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1724. KARNAP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 390.

No. 72–6208. WRIGHT *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 123.

No. 72–6342. HAMBLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6414. RIDINGS ET AL. *v.* KERR, CHAIRMAN, CALIFORNIA ADULT AUTHORITY, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6470. ELLINGBURG *v.* HENLEY, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6475. GRANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 648.

No. 72–6500. LEE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 270 So. 2d 544.

No. 72–6518. SLABAUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 592.

No. 72–6549. KERR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6554. COOK *v.* BELDEN CONCRETE PRODUCTS, INC., DIVISION OF ROCKWIN CORP. C. A. 5th Cir. Certiorai denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 999.

No. 72–6556. BRUMMEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 1263.

No. 72–6567. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 901.

No. 72–6573. ELAM ET AL. *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 582.

No. 72–6583. FARMER *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 22.

No. 72–6586. RULNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6589. DISBROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 425 F. 2d 1002.

No. 72–6606. BRASWELL *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6613. SANDOVAL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 542.

No. 72–6618. CRISTANCHO-PUERTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1025.

No. 72–6619. PRECIADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1346.

No. 72–6630. BYNUM *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 282 N. C. 552, 193 S. E. 2d 725.

No. 72–6636. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 154 U. S. App. D. C. 308, 475 F. 2d 419.

No. 72–6638. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 334.

No. 72–6642. KING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 402.

No. 72–6644. AGNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1396.

No. 72–6657. DUPRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1345.

No. 72–6661. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 853.

No. 72–6668. PALMA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 8 Cal. 3d 798, 505 P. 2d 1018.

No. 72–6669. EMMA *v.* ARMSTRONG ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 656.

No. 72–6677. ROSS *v.* CHASE ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6679. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 112.

No. 72–6684. CORREA-NEGRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 684

No. 72–6688. PENTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 92.

No. 72–6711. HINES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 1034.

No. 72–6712. OLIVER *v.* THOMS, ACTING PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6713. MARKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1405.

No. 72–6714. MILEY *v.* DELTA MARINE DRILLING CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 856.

No. 72–6715. HANNA *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1349.

No. 72–6721. BUSSY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 31 N. Y. 916, 292 N. E. 2d 788.

No. 72–6723. FERRADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6726. THOMAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 981.

No. 72–6727. ORR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1365.

No. 72–6734. CHRISTIAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6738. PARROTT *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. MR. JUSTICE

DOUGLAS would grant certiorari. Reported below: 476 F. 2d 1058.

No. 72–6742. QUEVEDO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6745. ARNOLD *v.* KIRBY ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6758. MCDADE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 49 Ala. App. 533, 274 So. 2d 89.

No. 72–6777. ROSENBERG *v.* MARTIN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 520.

No. 72–6787. WEATHERS *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6834. CUNNINGHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6856. DAUGHTERY *v.* HARRIS, WARDEN; and No. 72–6857. PIPER *v.* HARRIS, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 292.

No. 72–6858. FORD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 169.

No. 72–6871. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 1046.

No. 72–6872. CONTE *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 698.

No. 72–6879. BAILEY *v.* HOUSTON CHRONICLE PUBLISHING CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1344.

No. 72–6908. GASCOIGNE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6924. SIMPSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 154 U. S. App. D. C. 350, 475 F. 2d 934.

No. 72–6941. THUNDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 1326.

No. 72–6967. PITMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1335.

No. 73–3. GOLDSTEIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 1061.

No. 73–11. ASSOCIATED STUDENTS OF WESTERN KENTUCKY UNIVERSITY ET AL. *v.* DOWNING ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1132.

No. 73–14. ARCA ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–16. MOGULNICKI *v.* KELLER ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–32. FINANCIAL INDUSTRIAL FUND, INC. *v.* MCDONNELL DOUGLAS CORP. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 514.

No. 73–41. FABRYCKI ET AL. *v.* TRUSTEES OF INDIANA UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1405.

No. 73–42. MUHLETHALER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 9 Ill. App. 3d 388, 292 N. E. 2d 438.

No. 73–52. VESTAL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 283 N. C. 249, 195 S. E. 2d 297.

No. 73–87. POTTER *v.* STATE PERSONNEL BOARD OF REVIEW. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–89. WACHTEL ET UX. *v.* WEST ET UX. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 1062.

No. 73–131. PENN YAN BOATS, INC. *v.* SEA LARK BOATS, INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 1328.

No. 73–136. SANTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 721.

No. 73–143. THEODORIES *v.* PETERSON MARINE SERVICES, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1345.

No. 73–144. LOCAL 7–210, OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO *v.* UNION TANK CAR CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 194.

No. 73–195. ZICARELLI *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 122 N. J. Super. 225, 300 A. 2d 154.

No. 73–5004. ESSEX *v.* ELLIOTT. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1344.

No. 73–5015. GARCIA ET AL. *v.* JONES, DIRECTOR, STATE DIVISION OF FAMILY SERVICES. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 29 Utah 2d 409, 510 P. 2d 1099.

No. 73–5023. LASSITER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 16 N. C. App. 377, 192 S. E. 2d 21.

No. 73–5032. LOMAX ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 1400.

No. 73–5039. JOHNSON *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5048. TURK *v.* MITCHELL. Ct. App. Ohio, Lucas County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5055. CAINE ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 S. W. 2d 824.

No. 73–5119. FARMER ET VIR *v.* TOLEDO EDISON CO. Ct. App. Ohio, Ottawa County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5134. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5146. SHEFFIELD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 62 N. J. 441, 303 A. 2d 68.

No. 73–5195. SLUDER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 493 S. W. 2d 467.

No. 73–5226. ARCHULETA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 85 N. M. 146, 509 P. 2d 1341.

No. 73–5259. MARTIN *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 658.

No. 72–1386. ERDOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 474 F. 2d 157.

No. 72–1420. PEPSICO, INC. *v.* FEDERAL TRADE COMMISSION ET AL.; and

No. 72–1422. PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART

took no part in the consideration or decision of these petitions. Reported below: 472 F. 2d 179.

No. 72–1504. COCA-COLA CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 475 F. 2d 299.

No. 72–1440. OLENZ *v.* MAROVITZ, U. S. DISTRICT JUDGE, ET AL. C. A. 7th. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–1572. BINKLEY *v.* MANUFACTURER'S LIFE INSURANCE CO. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 471 F. 2d 889.

No. 72–1604. HEWLETT *v.* HEWLETT. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 486 S. W. 2d 107.

No. 72–1642. BROWN *v.* TENNESSEE REAL ESTATE COMMISSION. Ct. App. Tenn. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 494 S. W. 2d 506.

No. 72–1669. CONTINENTAL DEVELOPMENT CORP., INC. *v.* VINES ET AL. Sup. Ct. Ala. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 289 Ala. 648, 270 So. 2d 661.

No. 72–1720. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 492 S. W. 2d 955.

No. 72–1741. RANDOLPH *v.* SCHOOL DISTRICT 201 ET AL. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 73–47. LAMBERT ET VIR *v.* SUPREME COURT OF COLORADO. Sup. Ct. Colo. Motion to dispense with printing petition granted. Certiorari denied. Reported below: — Colo. —, 507 P. 2d 865.

No. 73–183. BRADLEY *v.* DOHERTY ET AL. Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 30 Cal. App. 3d 991, 106 Cal. Rptr. 725.

No. 73–192. PERRELLO *v.* DISCIPLINARY COMMISSION OF THE INDIANA SUPREME COURT. Sup. Ct. Ind. Motion to dispense with printing petition granted. Certiorari denied. Reported below: — Ind. —, 295 N. E. 2d 357.

No. 72–1508. NEW JERSEY ET AL. *v.* THOMAS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 2d 735.

No. 72–1614. MACDOUGALL, CORRECTION COMMISSIONER, ET AL. *v.* LAREAU. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 473 F. 2d 974.

No. 72–1653. DOOLING, U. S. DISTRICT JUDGE *v.* HILBERT. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 476 F. 2d 355.

No. 72–1714. PATTERSON, WARDEN *v.* JOHNSON. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 475 F. 2d 1066.

No. 73–126. PENNSYLVANIA *v.* PIERCE. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pau-*

peris granted. Certiorari denied. Reported below: 451 Pa. 190, 303 A. 2d 209.

No. 72–1540. TAYLOR ET VIR *v.* JONES. Sup. Ct. Ala. Motions to dispense with printing petition and respondent's briefs granted. Certiorari denied. Reported below: 290 Ala. 268, 276 So. 2d 130.

No. 72–1621. PELUSO, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 474 F. 2d 605.

No. 72–1622. ANDERSON ET AL. *v.* SALT LAKE CITY CORP. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 475 F. 2d 29.

No. 72–1631. SOCIALIST WORKERS PARTY *v.* KLASSEN, POSTMASTER GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE would grant certiorari.

No. 72–1679. HACKETT, DIRECTOR, DEPARTMENT OF EMPLOYMENT SECURITY OF RHODE ISLAND, ET AL. *v.* GRINNELL CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 475 F. 2d 449.

No. 73–1. FLORIDA *v.* ANDERSEN. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 274 So. 2d 228.

No. 72–1688. IN RE TIME SALES FINANCE CORP. (BLANK, ROME, KLAUS & COMISKY, REAL PARTY IN INTEREST). C. A. 3d Cir. Motion to defer consideration and certiorari denied. Reported below: 475 F. 2d 1396.

No. 72–6576. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. C. A. 9th Cir. Motion to defer consideration and certiorari denied.

No. 73–147. TECHNOGRAPH PRINTED CIRCUITS, LTD., ET AL. *v.* MARTIN MARIETTA CORP. ET AL. C. A. 4th Cir. Motion to defer consideration and certiorari denied. Reported below: 474 F. 2d 798.

No. 72–1716. IN RE TAYLOR. Sup. Ct. Ind. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Ind. ——, 293 N. E. 2d 779.

No. 72–6905. REID *v.* WISCONSIN. C. A. 7th Cir. Motion of petitioner to add County of Milwaukee Civil Service Agency et al. as parties respondent and certiorari denied.

No. 73–74. HOFFA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 471 F. 2d 391.

No. 73–112. MURPHY ET AL. *v.* SULLIVAN ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 156 U. S. App. D. C. 28, 478 F. 2d 938.

No. 73–145. UNION BANK OF LOS ANGELES *v.* NOLAN; and

No. 73–204. JUDICIAL COUNCIL OF THE THIRD CIRCUIT *v.* NOLAN ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of these petitions. Reported below: 481 F. 2d 41.

No. 73–149. TAYLOR *v.* TENNESSEE ET AL. Sup. Ct. Tenn. Motion to correct errors in petition granted. Certiorari denied.

No. 73–5194. AKULICZ *v.* WOLKE, SHERIFF. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari.

Rehearing Denied

No. 70–35. AUSTIN ET AL. *v.* MEYER ET AL., 413 U. S. 905;

No. 70–43. MILLER ET AL. *v.* UNITED STATES, 413 U. S. 913;

No. 70–73. MILLER *v.* CALIFORNIA, 413 U. S. 15;

No. 71–599. MOTION PICTURE FILM ENTITLED "VIXEN" ET AL. *v.* OHIO EX REL. KEATING, 413 U. S. 905;

No. 71–1051. PARIS ADULT THEATRE I ET AL. *v.* SLATON, DISTRICT ATTORNEY, ET AL., 413 U. S. 49;

No. 71–1315. ALEXANDER ET AL. *v.* VIRGINIA, 413 U. S. 836;

No. 71–1517. MILLER *v.* UNITED STATES, 413 U. S. 913;

No. 72–357. PRICE *v.* VIRGINIA, 413 U. S. 912;

No. 72–419. PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL., 413 U. S. 376;

No. 72–459. SLOAN, TREASURER OF PENNSYLVANIA *v.* LEMON ET AL., 413 U. S. 825;

No. 72–649. CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT ET AL. *v.* CISNEROS ET AL., 413 U. S. 922;

No. 72–1108. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION, 412 U. S. 931; and

No. 72–1166. WRIGHT *v.* UNITED STATES, 412 U. S. 938. Petitions for rehearing denied.

No. 72–1187. COMBS, SUPERINTENDENT, GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* JOHNSON ET AL., 413 U. S. 922;

No. 72–1221. GULF STATES THEATRES OF LOUISIANA, INC., ET AL. *v.* LOUISIANA ET AL., 413 U. S. 913;

No. 72–1235. WHITMAN CENTER, INC. *v.* GULF OIL CORP., 412 U. S. 938;

No. 72–1247. TWO *v.* UNITED STATES ET AL., 412 U. S. 931;

No. 72–1313. SILVERTON *v.* CALIFORNIA, 412 U. S. 901;

No. 72–1349. FREEMAN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (BAY FARM ISLAND RECLAMATION DISTRICT No. 2105 ET AL., REAL PARTIES IN INTEREST), 412 U. S. 909;

No. 72–1376. PERMIAN CORP. ET AL. *v.* COFFEE, 412 U. S. 920;

No. 72–1396. FAUSNER *v.* COMMISSIONER OF INTERNAL REVENUE, 413 U. S. 838;

No. 72–1413. ITZ ET UX. *v.* PENICK ET AL., 412 U. S. 925;

No. 72–5348. COOLEY *v.* STRICKLAND TRANSPORTATION CO. ET AL., 413 U. S. 923;

No. 72–6115. JACKSON *v.* ZELKER, CORRECTIONAL SUPERINTENDENT, 412 U. S. 950;

No. 72–6221. SAYLES *v.* ALBERT MIRMAN & ASSOCIATES, INC., 412 U. S. 925;

No. 72–6224. BERKLEY *v.* UNITED STATES, 412 U. S. 920;

No. 72–6293. GEMMILL ET AL. *v.* CALIFORNIA, 412 U. S. 925;

No. 72–6295. BOYSAW *v.* OHIO, 412 U. S. 920;

No. 72–6468. LAUGHLIN *v.* UNITED STATES, 412 U. S. 941; and

No. 72–6481. HAMILTON *v.* UNITED STATES, 412 U. S. 942. Petitions for rehearing denied.

No. 72–6493. BONAFINI *v.* NEW JERSEY ET AL., 412 U. S. 908;

No. 72–6506. SMITH *v.* CALIFORNIA, 412 U. S. 915;

No. 72–6641. CRENSHAW *v.* JAMES ET AL., 412 U. S. 952; and

No. 72–6673. OAKES *v.* BLACK, REFORMATORY SUPERINTENDENT, 412 U. S. 952. Petitions for rehearing denied.

No. 71–507. KEYES ET AL. *v.* SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL., 413 U. S. 189. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA, 412 U. S. 546. Motion of International Tape Manufacturers Assn. for leave to file a brief as *amicus curiae* out of time granted. Petition for rehearing denied.

No. 71–1422. KAPLAN *v.* CALIFORNIA, 413 U. S. 115. Motions of Association of American Publishers, Inc., et al., American Library Assn., and Authors League of America for leave to file briefs as *amici curiae* in support of rehearing granted. Petitions for rehearing denied.

No. 71–1599. COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL–CIO, ET AL. *v.* BYRD ET AL., 409 U. S. 848;

No. 72–761. UNITED STATES *v.* MCGRATH, 412 U. S. 936;

No. 72–1415. RICHTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 412 U. S. 925;

No. 72–5588. MCCRAY *v.* WARDEN, MARYLAND PENITENTIARY, 409 U. S. 1112;

No. 72–6436. SAVAGE *v.* UNITED STATES, 412 U. S. 930; and

No. 72–6543. OLIVER *v.* SHAPP, GOVERNOR OF PENN-

SYLVANIA, ET AL., 412 U. S. 930. Motions for leave to file petitions for rehearing denied.

No. 71–5856. CACAVAS *v.* GENERAL MOTORS CORP., ET AL., 405 U. S. 993. Motion for leave to file petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 72–549. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA, ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL., 412 U. S. 92; and

No. 72–550. BRADLEY ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL., 412 U. S. 92. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 72–804. FRI, ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL., 412 U. S. 541. Motions of State of Utah and Utah Power & Light Co. for leave to file petitions for rehearing as *amici curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 72–1259. TEITELBAUM *v.* CALIFORNIA, 412 U. S. 946. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 72–1352. IN RE BAKER, 412 U. S. 919. Motion to dispense with printing petition for rehearing granted. Motion for leave to file petition for rehearing denied.

No. 72–6197. SHOEMAKER *v.* DWYER ET AL., 412 U. S. 902, 963. Motion for leave to file second petition for rehearing denied.

OCTOBER 10, 1973

Dismissal Under Rule 60

No. 72–1701. SHAPIRO *v.* FERRANDINA, U. S. MARSHAL. C. A. 2d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 478 F. 2d 894.

OCTOBER 15, 1973

Affirmed on Appeal

No. 73–94. UNITED STATES STEEL CORP. *v.* TRUSTEES OF PENN CENTRAL TRANSPORTATION CO. Affirmed on appeal from C. A. 3d Cir. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 477 F. 2d 841.

Appeals Dismissed

No. 72–1681. HAMPTON *v.* DITTY. Appeal from Ct. App. Ky. It appearing that appellant, who sought to enjoin a state criminal proceeding pending against him, died on January 20, 1973, the appeal is dismissed. *Gersewitz* v. *New York*, 326 U. S. 687 (1945); *Pennsylvania* v. *Linde*, 409 U. S. 1031 (1972). See *Durham* v. *United States*, 401 U. S. 481, 482 (1971). Reported below: 490 S. W. 2d 772.

MR. JUSTICE DOUGLAS, concurring.

If this were a case where appellant had been convicted under a state statute which he claimed to be unconstitutional under the Federal Constitution, our procedure arguably should not be a mere dismissal of the appeal. For that appeal would bring here a federal question as a matter of right and then the appellant would not have had the benefit of the final constitutional adjudication to which he was entitled—a distinction that my Brother BLACKMUN noted in his dissent in *Durham* v. *United States*, 401 U. S. 481, 484 (1971). In that case the formula of *Durham*—vacating and remanding for dismissal of the judgment—might be the most appropriate remedy in both state and federal cases, saving cases here on certiorari from state courts to be dismissed, since certiorari is in our discretion. But here there was no criminal conviction; the suit in the state court merely involved an attempt to enjoin a criminal prosecution; and there are

no ongoing penalties or disabilities adhering in a judgment entered before the federal question had been finally resolved. Hence I concur in the judgment of this Court.

No. 72–1718. GASKIN ET AL. *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 490 S. W. 2d 521.

No. 73–69. HAULCOMB ET AL. *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 260 S. C. 260, 195 S. E. 2d 601.

No. 72–1736. WHITE *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 230 Ga. 327, 196 S. E. 2d 849.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

On the basis of *Turner* v. *Fouche,* 396 U. S. 346 (1970), I concur in the dismissal of appellant's facial attack on Georgia's jury selection statutes. However, I would treat the jurisdictional statement as a petition for certiorari in respect of the second question presented,* see 28 U. S. C. § 2103; *Mishkin* v. *New York,* 383 U. S. 502, 512 (1966), and to that extent set the case for oral argument.

Appellant alleges that the application by the jury commissioners of Coweta County of the Georgia jury selection statutes violated the Fourteenth Amendment in that such application resulted in blacks, women, and

*"Does systematic, intentional and discriminatory exclusion of Negroes, women and young adults age 18 to 30, from jury service, violate Appellant's rights of Due Process and Equal Protection under the Fourteenth Amendment and does disproportionate underrepresentation of these groups in the jury pools constitute a prima facie case of discrimination?"

young adults age 18–30 being underrepresented on the venire from which his grand and petit juries were impaneled. The relevant Georgia statutes, Ga. Code Ann. §§ 59–106, 59–201, require the county board of jury commissioners, at least biennially, to compile a jury list of "intelligent and upright citizens," who represent a fair cross section of the county, to serve as petit jurors. From this list, the commissioners are required to select the "most experienced, intelligent, and upright citizens," not exceeding two-fifths of the whole number, to serve as grand jurors.

Appellant, a white male 24 years of age, challenged the array of the grand and petit juries which indicted and convicted him, on the ground that the jury list composing the venire was compiled in an arbitrary and discriminatory manner. The jury commissioners testified that a juror was not selected for either grand or petit jury service unless the juror was known personally by at least one commissioner. Appellant argues that this selection procedure permits the jury commissioners to know the race, sex, and approximate age of every juror before the venire is selected, and that as a consequence, a clear and ready opportunity for discrimination inheres in the selection procedure. Appellant buttresses this conclusion with uncontroverted statistical evidence that the population of Coweta County is composed of 28.3% eligible blacks, 53.3% eligible women, and 26.2% eligible young adults aged 18–30. Yet, the 2,138 names placed on the petit jury list included only 10.85% blacks, 16.23% women, and 3.09% young adults. Of the 400 persons found to be the "most experienced" and placed on the grand jury list, only 14.25% were blacks, 4.5% were women, and 1.25% were young adults.

Nevertheless, the Georgia Supreme Court held that:

"With respect to the contention of de facto dis-

crimination by the jury commissioners in the selection of individuals to be placed on the jury list, it is sufficient to say that appellant did not introduce evidence demanding the conclusion of de facto discrimination." 230 Ga. 327, 331, 196 S. E. 2d 849, 853 (1973).

Although a defendant in a criminal case does not have a constitutional right to grand and petit jury arrays that represent the community in exact, mathematical proportions, the selection procedure employed must provide "a fair possibility for obtaining a representative cross-section of the community." *Williams* v. *Florida*, 399 U. S. 78, 100 (1970). "[A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." *Peters* v. *Kiff*, 407 U. S. 493, 502 (1972) (opinion of MARSHALL, J.).

Appellant's challenge to the racial composition of the venire appears to me to require application of the principles that guided our judgment in *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). In *Alexander* petitioner introduced statistical evidence that blacks composed 21.06% of the population, but only 6.75% of the grand jury panels, demonstrating an underrepresentation of 67.9%. In addition, petitioner introduced evidence that the jury commissioners used information cards which designated the race of each potential juror. We held that petitioner's statistical evidence establishing that blacks were underrepresented, together with the evidence that the selection procedures themselves were not racially neutral, established a prima facie case of invidious racial discrimination, and thus shifted the burden of proof to the State "to rebut the presumption of unconstitutional action by showing that permissible racially neutral se-

lection criteria and procedures have produced the monochromatic result. *Turner* v. *Fouche*, 396 U. S. 346, 361 (1970); *Eubanks* v. *Louisiana*, 356 U. S. 584, 587 (1958)." *Id.*, at 632. Since the State failed to meet its burden of proof, we set aside Alexander's conviction.

Similarly, appellant's statistics here demonstrate substantial underrepresentation of blacks on the grand and petit jury venires, 49.5% and 61.7% respectively. Furthermore, there inheres in the selection procedures employed by the Coweta County jury commissioners the same fatal defect we found in the procedures employed in *Alexander*, *i. e.*, the procedures assure that the jury commissioner shall learn the race of every potential juror before the list is compiled. See *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Whitus* v. *Georgia*, 385 U. S. 545 (1967). Thus, appellant in this case also seems to have established a prima facie case of racial discrimination, which under *Alexander* shifted to the State the burden of proof to rebut the presumption of unconstitutional action. Under *Alexander* also, the State's evidence in the form of the testimony of the jury commissioners that they made no conscious effort to exclude anyone on the basis of race, sex, or age would not appear to suffice to rebut the presumption. For in *Alexander* we held that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner* v. *Fouche*, *supra*, at 361; *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967)." 405 U. S., at 632.

Appellant also contends that women and young adults age 18–30 were systematically and purposefully excluded from the venire from which the grand and petit jury lists were compiled. The statistical evidence indicates that women were underrepresented by 91.6% on the grand jury list, and 70.6% on the petit jury list. Young

adults were underrepresented by 95.2% on the grand jury list, and 88.2% on the petit jury list. Though *Alexander* involved racial discrimination, appellant's contention certainly presents a substantial question whether the principles of that decision should apply where any large, identifiable segment of the community is arbitrarily or discriminatorily underrepresented on the jury venire. Therefore, I would set this case for oral argument to consider both appellant's racial claims and his claims that a selection procedure which enables jury commissioners to know the sex and approximate age of potential jurors also constitutes a prima facie case of sex or age discrimination.

No. 72–6629. THOMPSON ET AL. *v.* MISSISSIPPI. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 269 So. 2d 641.

MR JUSTICE DOUGLAS, dissenting.

Appellants were part of a group of 25 to 60 blacks congregating about the center of a small Mississippi town. A local police officer approached the crowd and asked them to disperse. The crowd was not interfering with traffic; the officer had received no complaints; and the only person he knew to be bothered by the crowd was himself. The officer attempted to arrest appellant A. B. Thompson for disturbing the peace after A. B. cursed and acted "real tough." The officer testified that the crowd "started around" him and he pulled his gun.*

*There was further testimony that he pointed the gun at A. B.'s chest and said: "You don't believe I will shoot you." R. 149, 162. There is a great deal of conflicting testimony, but the record strongly suggests that the officer's provocative conduct engendered the crowd mumbling and "rambling" which the court below held a "riot." This merely underscores the desirability of our hearing appellants' claim.

"Because a claim of constitutionally protected right is involved, it 'remains our duty in a case such as this to make an independent

He left the crowd and returned with two more officers, again attempting to arrest A. B. after the youth "hurled a vile obscenity" at him. A. B. resisted and in the resulting scuffle was shot. Along with his brother Leon who entered the scuffle when A. B. was shot and Davis Stewart who was "riling up the crowd," A. B. was convicted of riot under a statute the constitutionality of which is here challenged. Mississippi Code Ann. of 1942, § 2361.5–01, subd. A, provides:

> "A 'riot' is any use of force or violence disturbing the public peace, or any threat to use such force and violence, if accompanied by immediate power of execution, by two (2) or more persons acting together and without authority of law."

Appellants complain of the vagueness and overbreadth in the phrase "disturbing the public peace."

According to the court below, the "riot" was underway when the officer returned and attempted to arrest A. B., the officer's actions being referred to as an attempt to "quell a riot that had been instigated and encouraged by this appellant's cursing and using obscene language to excite the crowd." 269 So. 2d 641, 644. Since appellants challenge the facial constitutionality of a statute which, according to the Mississippi Supreme Court, defines the congregation of blacks in this case as a "riot," the fact that A. B. and Leon Thompson forcefully resisted the police intervention does not end the case. The fact that their action might fall within the statute if it were constitutionally narrowed, does not negate their ability to challenge the statute. *Gooding* v. *Wilson,* 405 U. S. 518, 521.

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examination of the whole record.' *Edwards* v. *South Carolina,* 372 U. S. 229, 235; *Blackburn* v. *Alabama,* 361 U. S. 199, 205 n. 5; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Fiske* v. *Kansas,* 274 U. S. 380, 385–386." *Cox* v. *Louisiana,* 379 U. S. 536, 545 n. 8.

Any statute which classifies the congregation of blacks in this case as a riot raises serious constitutional questions. The state court places no limiting construction upon the statute. It first notes that the statute is similar to the federal riot control statute, then discusses whether other Mississippi statutes are constitutional, and finally concludes that the challenged statute "sufficiently informed the defendants of the essential elements of the offense." 269 So. 2d, at 644. The challenged statute is *not* like its federal counterpart. Title 18 U. S. C. § 2102, unlike the Mississippi statute, necessitates a clear and present danger of property damage or personal injury. The conclusory statement that these defendants were sufficiently informed of the essential elements, is not an answer to the matter of overbreadth.

I would note probable jurisdiction.

No. 72–6634. SMITH *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6659. SMITH *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6822. ALERS *v.* SOTO, JUDGE. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–79. JENNINGS *v.* CANOTT. Appeal from Sup. Ct. Iowa. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal

was taken as a petition for writ of certiorari, certiorari denied. Reported below: 202 N. W. 2d 48.

No. 73–5046. STOKES *v.* BRUCE ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 477 F. 2d 600.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

Petitioner,[1] a 50-year-old inmate in the Kentucky prison system, brought a *pro se* action for damages under 42 U. S. C. § 1983, alleging that prison officials had violated his civil rights. Petitioner alleged that on two separate occasions, Kentucky prison officials notified him of a transfer from one institution to another at 2:30 or 3 p. m., and that he was moved later on the same day. On the occasion of the first of these transfers on short notice (apparently on October 8, 1970, from the Kentucky State Reformatory in LaGrange to the Kentucky State Penitentiary in Eddyville), officers allegedly refused to give petitioner time to recover two books on auto mechanics which he had been compiling for two years. On the occasion of the second of these transfers (apparently on August 14, 1972, back to the reformatory), prison officials did not allow petitioner to recover a book in which he had alphabetized legal cases, laboring on weekends for a year.[2]

[1] Since there is no jurisdiction for an appeal, this action should be treated as a petition for certiorari. 28 U. S. C. § 2103.

[2] Apparently also on the occasion of the second transfer, petitioner was required by prison regulations to mail his personal belongings to somebody on the outside, who could then mail the items back to him after his transfer to the new institution. Coupled with a prison regulation which permits inmates to receive books only from publishing houses, this served to work a particular hardship on petitioner. He was forced to mail a book, which he had pur-

Petitioner contends that the First Amendment gives him the right "to read and write. To think and to put it on paper." He argues, also, that the action of the prison officials violated the Fourth, Fifth, and Eighth Amendments, which are applicable to the States through the Fourteenth Amendment.

The District Court dismissed petitioner's action and deemed any appeal "frivolous" on the ground that alleged loss of property could not establish jurisdiction under the Civil Rights Act. We put such reasoning to rest in *Lynch* v. *Household Finance Corp.*, 405 U. S. 538. The Court of Appeals for the Sixth Circuit affirmed, on the ground that "the petitioner-appellant voluntarily relinquished possession of the personal property in question."

The assertion that petitioner voluntarily abandoned books on which he had labored for two years not only defies belief, but it is also unsupported by the record. The respondent prison officials do not contest petitioner's factual allegations, but rather state lamely that it is "clear from the facts" that petitioner voluntarily gave up his property. And even if he did not, respondents argue that:

> "The question presented is whether the administrative policies at the Kentucky State Penitentiary at Eddyville, Kentucky, and the administrative policies at the Kentucky State Reformatory at LaGrange in transferring him on short notice requiring him to abandon, give away, or mail home various personal items . . . are violative of his constitutional rights, or of the rights of inmates generally.
>
> "Allegations made by the appellant in this appeal as heretofore set out utterly fail to state a violation

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chased from a publishing house while at the penitentiary, to a friend on the outside, but the friend was not able to mail it back to him at the reformatory.

> of his civil rights. . . . [T]he transferring of appellant from one prison to the other, as well as the fact that in any such move certain procedures must be followed with regard to the transfer of properties, are proper regulatory functions prescribed and administered by the prison officials and not violative of any civil rights."

I cannot agree. This case may to some seem picayune. But basically it presents the substantial question of whether senseless, medieval practices of state officials can be "immunized" from the reach of the Civil Rights Act simply because they occur within the walls of prisons. See *Sostre* v. *McGinnis*, 442 F. 2d 178 (CA2 1971). I would grant certiorari.

Vacated and Remanded on Appeal

No. 72–1519. DUNLAVEY, DEPUTY CORRECTIONS DIRECTOR, ET AL. *v.* BERENGUER ET AL. Appeal from D. C. Del. Judgment vacated and case remanded with directions to dismiss case as moot. Reported below: 352 F. Supp. 444.

Certiorari Granted—Vacated and Remanded. (See also No. 72–552, *ante*, p. 1.)

No. 72–1721. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* COTTLE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). Reported below: 477 F. 2d 269.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACKMUN concurs, dissenting.

In *Gagnon* v. *Scarpelli*, 411 U. S. 778, this Court was presented with the question whether an indigent probationer or parolee has a due process right to appointed counsel at revocation hearings. Noting that

"due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed" by judicializing the revocation process with the presence of attorneys, a case-by-case analysis was held necessary for that determination. *Id.*, at 788. The Court today remands for such an analysis. But the only issue in this case is whether the court below was correct in holding that the Equal Protection Clause requires the right to appointed counsel at parole revocation hearings in cases where, unlike *Gagnon* v. *Scarpelli, supra,* a solvent parolee has a statutory right to the presence of retained counsel. *Gagnon* is inapposite. The State of Florida has already determined by statute that any interest in flexibility and informality derived from the absence of attorneys will *always* be sacrificed when a parolee of means desires the assistance of counsel. Whether in such cases the Equal Protection Clause demands that indigent parolees be afforded the same representation rights was not answered in *Gagnon.* I would take this case in order to decide it here.

No. 72–6566. CHAMBERS *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973).

No. 73–163. LUCAS ET AL. *v.* RIVERS. C. A. 6th Cir. Motion to dispense with printing respondent's brief and certiorari granted. Judgment vacated and case remanded for consideration of question of mootness in light of *People* v. *McMiller,* 389 Mich. 425, 208 N. W. 2d 451 (1973). Reported below: 477 F. 2d 199.

No. 73–5028. MILLER *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded

for further consideration in light of *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). Reported below: 477 F. 2d 595.

No. 73–5029. WILSON *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed September 8, 1973, judgment vacated and case remanded to the United States District Court for the Northern District of California for reconsideration in light of the position presently asserted by the Government. Reported below: 473 F. 2d 297.

Certiorari Dismissed

No. 73–5007. CONNOLLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed. *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970). Reported below: 479 F. 2d 930.

Miscellaneous Orders

No. A–228 (73–5213). FAWCETT ET AL. *v.* UNITED STATES C. A. 7th Cir. Application by petitioner Manuel for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 481 F. 2d 1406.

No. A–331 (73–392). DALY *v.* UNITED STATES. C. A. 8th Cir. Application for bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Reported below: 481 F. 2d 28.

No. A–344 (73–640, *sub nom. Geduldig* v. *Aiello*). HANSEN, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT *v.* AIELLO ET AL. D. C. N. D. Cal. Application for stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted pending fur-

ther order of the Court. Reported below: 359 F. Supp. 792.

No. A–335. HEUTSCHE *v.* UNITED STATES. C. A. 7th Cir. Application for bail presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

MR. JUSTICE DOUGLAS, dissenting.

Mr. Justice Holmes in *Olmstead* v. *United States,* 277 U. S. 438, 470 (dissenting), called wiretapping "dirty business." That decision was rendered in 1928. Since that time "dirty business" has become the apt phrase describing the regime under which we now live. The warrant requirement which this Court imposed as a condition to that kind of surveillance, *Berger* v. *New York,* 388 U. S. 41, and the Act of Congress which implemented that decision, 18 U. S. C. §§ 2510–2520; *United States* v. *U. S. District Court,* 407 U. S. 297, have been flouted. We who live in the District of Columbia know that electronic surveillance is commonplace. I am indeed morally certain that the Conference Room of this Court has been "bugged"; and President Johnson during his term in the White House asserted to me that even his phone was tapped.

We deal with a disease that has permeated our society. Certainly Ms. Heutsche is an "aggrieved" person within the meaning of 18 U. S. C. § 3504 (a)(1).[1] That section

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[1] "§ 3504. (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . ."

does not restrict its protection to conversations of an accused. It should be liberally construed as it deals with the right of privacy protected by the Fourth Amendment. The conversation of one's lawyer over the telephone may be as helpful to Big Brother as the conversation of the accused herself. The lawyer preparing the defense may in his telephone conversations reveal concessions made by the accused or his trial strategy or clues to the defense which will be proffered that may be extremely helpful to the prosecution. If electronic surveillance were strictly employed by the Executive Branch, we might be chary of enlarging its duties as requested here. But since we live in a regime where the "dirty business" of wiretapping runs rampant, I would apply the statute liberally to check the disease which almost every newspaper tells us has poisoned our body politic.

We are told that in this case the applicant's lawyers did discuss her case with persons other than herself over the telephone. Is Big Brother to have a ringside seat where he can listen to all the confidences of lawyers who defend an accused? If so, what happens to the valued right of counsel protected by the Sixth Amendment?

On June 26, 1972, Margaret Heutsche, the applicant herein, was arrested by the FBI on charges relating to the removal and destruction of Government property from a Selective Service System office. Although a preliminary hearing resulted in a finding of probable cause, she remained free on her own recognizance and heard nothing further on the case until called to testify before a federal grand jury nearly a year later. When she invoked her constitutional right to refrain from testifying, the Government obtained a grant of use immunity pursuant to 18 U. S. C. § 6002 and an order from the District Court compelling the applicant to testify. The

applicant again refused to testify and sought reconsideration of the District Court order, claiming that the subpoena and the questions propounded by the grand jury were the product of illegal electronic surveillance of her and that the Government had not properly affirmed or denied that claim as required by 18 U. S. C. § 3504.[2] She claims that the same barrier extends to her lawyer. The applicant also moved for a disclosure of any electronic surveillance of her attorneys and their consultants, and for an evidentiary hearing on the sufficiency of the disclosure.

In response to the motions, the Government filed the affidavit of a high Justice Department official to the effect that, based on an inquiry addressed to seven federal agencies: [3]

> "[T]here has been no electronic surveillance occurring on premises known to have been owned, leased or licensed by Margaret Ann[e] Heutsche.
>
> "The deponent further states that there was no electronic surveillance directed against Margaret Ann[e] Heutsche, *per se*, and there have been no known overhearings by electronic surveillance, at any location, of conversations to which Margaret Ann[e] Heutsche was a party."

The applicant maintained that the surveillance denial was inadequate for, *inter alia*, failing to deny electronic surveillance of her attorneys and their associates and consultants which may have yielded conversations concerning her case. The applicant submitted affidavits

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[2] See n. 1, *supra*.

[3] The widespread use of electronic surveillance is demonstrated by the list of agencies consulted before making the denial: FBI; Bureau of Narcotics and Dangerous Drugs; Secret Service; IRS; Customs; Bureau of Alcohol, Tobacco and Firearms; and the Postal Service.

from several attorneys and consultants who swore that they discussed her case among themselves over phone lines on which all had been experiencing strange and suspicious problems.[4] On the basis of these affidavits the applicant requested an evidentiary hearing as to illegal electronic surveillance. The District Court denied relief and, upon the applicant's further refusal to testify, the Government moved that she be adjudged in contempt and ordered committed. Applicant submitted further affidavits and moved to cross-examine the Justice Department official who denied the existence of electronic surveillance.

The District Court again denied her motions and held applicant in contempt, ordering her submitted to the custody of the United States Marshal. The Court of Appeals affirmed, finding that the applicant had made no showing which would require the Government to make an investigation of electronic surveillance of her attorneys. The case is before this Court on the application of Ms. Heutsche to be released from custody pending review here of the decision of the Court of Appeals. The applicable standard for the relief sought is found in 28 U. S. C. § 1826 (b), which directs denial only if the issues are frivolous or the appeal is taken for purposes of delay.

I cannot agree that the applicant's showing is not sufficient *at least* to entitle her to an evidentiary hearing. In a country where the Government overhears

[4] At various times the affiants had difficulty placing calls, heard clicking noises over the lines, and heard strange voices and the sound of tape recorders in the background. In addition, a consultant with a Ph. D. in physics conducted relative field strength tests on the phone line of one of the attorneys and stated his belief that a radio frequency monitoring system had been applied to the line.

over 500,000 conversations a year pursuant to court authorized wiretaps alone,[5] it is difficult to gainsay anyone's fear of the intrusion of Big Brother's ear. The daily news brings fresh evidence to make a reality of Mr. Chief Justice Warren's warning that the "fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual . . . ."[6] In such circumstances the Govern-

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[5] Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, Table 4 (1972).

In 1954 I stated that:

"During 1952, there were in New York City alone at least 58,000 orders issued which allowed wiretapping—over 150 a day every day in the year. The New York system has in practice been oppressive; it has been used as the means whereby police have obtained guarded confidences of people and used the information for corrupt purposes." W. Douglas, An Almanac of Liberty 355 (1954).

After reading this statement District Attorney Edward Silver of New York attempted to obtain wiretap data from District Attorneys and police. He reported to the House Judiciary Committee that the total was only 480. Hearings on H. R. 762 before Subcommittee No. 5 of the House Committee on the Judiciary, 84th Cong., 1st Sess., 99 (1955). The Committee called Sidney Davis, former Law Clerk for Mr. Justice Black and the New York attorney who had helped me on the study. He testified as to a misunderstanding between us: there were not 58,000 orders but 58,000 taps, including illegal taps. *Id.*, at 203. District Attorney Frank Hogan of New York testified that claims of illegal wiretapping of such magnitude were "the cries of alarmists . . . who are inclined to . . . inflate incidents and conditions in order to sustain their arguments." *Id.*, at 322. But the "cries of alarm" proved realistic. In 1959, Samuel Dash, on the basis of extrapolations from man-hour statistics on policemen admittedly engaged in wiretapping activity, concludes that my estimates of that activity were "closer to the truth than the figures submitted by the police to [Edward Silver]." S. Dash, The Eavesdroppers 68–69 (1959).

[6] *Lopez* v. *United States*, 373 U. S. 427, 441 (1963) (concurring).

ment's claim that it should not be put to the task of searching its files for evidence of specific surveillance cannot be treated lightly. I take cognizance of the fact that the mass of aggregate data on the citizenry yielded in this Orwellian era may indeed make the task a difficult one.

But the difficulty which should concern us is that faced by the victim of illegal surveillance. How is the applicant in this case to establish the existence of such clandestine activity so expertly carried on by the Executive Branch? She has introduced sworn statements that her attorneys—themselves likely subjects of Government surveillance [7]—discussed her case over phone lines fraught with indicia of intrusion. She has introduced further sworn statements that electronic tests reveal a likelihood of such intrusion. Yet the court below held this insufficient even to require the Government to check its records on specific phone lines identified by the applicant.

The victims of illegal governmental surveillance are thus apparently faced with the insurmountable task of proving such surveillance before the Government will be asked to respond to allegations of its existence or participate in an evidentiary hearing to decide the matter. In seeking review of that holding the applicant raises serious issues of constitutional magnitude. She has alleged Government misconduct interfering not only with her right to privacy but with her right to the effec-

[7] Her attorneys include members of the San Francisco chapter of the National Lawyers Guild and an organization in Chicago known as the "Peoples Law Office." Peoples is a firm almost exclusively devoted to the criminal defense of "militants" and "radicals," including Chairman Fred Hampton of the Black Panther Party and Bernadine Dohrn and Marc Rudd of the Weatherman faction of the SDS.

tive assistance of counsel by destroying her attorneys' ability to discuss her case in confidence. Having shown all anyone will ever be able to show in this area prior to a Government response, she further questions how those constitutional rights have any meaning, when more is required before the victim of illegal surveillance is even entitled to a hearing. These are serious questions of broad impact in an area not yet expounded upon by this Court. In denying the requested interim relief, can the Court possibly hold that the attempt to raise those questions is frivolous? I would grant bail, expedite the grant of certiorari, and put the case down for early argument and decision.

No. 36, Orig. TEXAS *v.* LOUISIANA. Application for temporary restraining order, preliminary injunction, and other relief referred to Special Master. Report of Special Master on Louisiana's motion to enlarge reference to Special Master to include establishment of Louisiana's lateral boundary with Texas in the Gulf of Mexico, including briefing schedule contained therein, received and ordered filed and adopted. [For earlier orders herein, see, *e. g.*, 413 U. S. 918.]

No. 72–397. BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL. Sup. Ct. Ariz. [Certiorari granted, 410 U. S. 908.] Motion of Cocopak Tribe of Indians for leave to file an untimely brief as *amicus curiae* granted.

No. 72–403. SAMPSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. *v.* MURRAY. C. A. D. C. Cir. [Certiorari granted, *sub nom. Kunzig* v. *Murray*, 410 U. S. 981.] Motion of respondent to permit Thomas J. McGrew, Esquire, to argue *pro hac vice* granted.

No. 72–777. CLEVELAND BOARD OF EDUCATION ET AL. *v.* LAFLEUR ET AL. C. A. 6th Cir.; and

No. 72–1129. COHEN *v.* CHESTERFIELD COUNTY SCHOOL BOARD ET AL. C. A. 4th Cir. [Certiorari granted, 411 U. S. 947.] Motion of the Chamber of Commerce of the United States for leave to file an untimely brief as *amicus curiae* denied.

No. 72–782. GATEWAY COAL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. [Certiorari granted, 410 U. S. 953.] Motion of Frederick McAllister et al. for leave to file an untimely brief as *amicus curiae* denied.

No. 72–822. RENEGOTIATION BOARD *v.* BANNERCRAFT CLOTHING CO., INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 410 U. S. 907.] Motion of Sears, Roebuck & Co. for leave to participate in oral argument as *amicus curiae* denied.

No. 72–851. ONEIDA INDIAN NATION OF NEW YORK ET AL. *v.* COUNTY OF ONEIDA, NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 412 U. S. 927.] Motion of State of New York for leave to participate in oral argument as *amicus curiae* in support of respondents granted and State of New York to confine oral argument to questions presented. Motion for additional time to present oral argument denied.

No. 72–1162. FEDERAL POWER COMMISSION *v.* NEW ENGLAND POWER CO. ET AL. C. A. D. C. Cir. [Certiorari granted, 411 U. S. 981.] Motion of respondents for additional time for oral argument granted and 15 minutes allotted for that purpose. Petitioner also allotted 15 additional minutes for oral argument.

No. 72–1180. OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. *v.* AUSTIN ET AL. Appeal from Sup. Ct. Va. [Probable jurisdiction noted, 412 U. S. 917.] Motion of appellants for additional time for oral argument denied. Motion of appellees for divided argument granted.

No. 72–1188. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* RESERVISTS COMMITTEE TO STOP THE WAR ET AL. C. A. D. C. Cir. [Certiorari granted, *sub nom. Richardson* v. *Reservists Committee to Stop the War*, 411 U. S. 947.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 72–1318. KRAUSE, ADMINISTRATOR, ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. [Certiorari granted, 413 U. S. 919.] Motion of petitioners for additional time for oral argument denied.

No. 72–5847. ALEXANDER *v.* GARDNER-DENVER CO. C. A. 10th Cir. [Certiorari granted, 410 U. S. 925.] Motion of the Chamber of Commerce of the United States for leave to participate in oral argument as *amicus curiae* denied.

No. 72–6580. OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL–CIO *v.* TEXACO INC. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied without prejudice to file printed petition in conformity with Rule 39 of the Rules of this Court and to pay the Clerk's costs on or before November 14, 1973.

No. 73–40. WALLACE, ACTING WARDEN *v.* SMITH. C. A. 4th Cir. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before November 14, 1973.

No. 73–5072. MATTHEWS *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

No. 73–5186. MOORE *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE DOUGLAS would grant the motion.

Probable Jurisdiction Noted

No. 73–191. VILLAGE OF BELLE TERRE ET AL. *v.* BORAAS ET AL. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 476 F. 2d 806.

No. 73–38. UNITED STATES *v.* MARINE BANCORPORATION, INC., ET AL. Appeal from D. C. W. D. Wash. Motions to advance oral argument denied. Probable jurisdiction noted.

Certiorari Granted

No. 72–1517. GILMORE ET AL. *v.* CITY OF MONTGOMERY, ALABAMA, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 473 F. 2d 832.

No. 72–1597. BEASLEY ET AL. *v.* FOOD FAIR OF NORTH CAROLINA, INC., ET AL. Sup. Ct. N. C. Certiorari granted. Reported below: 282 N. C. 530, 193 S. E. 2d 911.

No. 73–190. BELLIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 483 F. 2d 961.

No. 72–6902. GOODING *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis*

and certiorari granted. Reported below: 155 U. S. App. D. C. 259, 477 F. 2d 428.

No. 73–62. WHEELER ET AL. *v.* BARRERA ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 475 F. 2d 1338.

No. 72–1660. BLACKLEDGE, WARDEN, ET AL. *v.* PERRY. C. A. 4th Cir. Motion to dispense with printing respondent's brief and certiorari granted.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. Certiorari granted. Parties requested to brief and argue, in addition to questions presented in petition, jurisdiction of the Court of Appeals. Reported below: 479 F. 2d 1005.

Certiorari Denied. (See also Nos. 72–6634, 72–6659, 72–6822, 73–79, and 73–5046, *supra.*)

No. 72–1602. SLAYTON, PENITENTIARY SUPERINTENDENT *v.* GARLAND. C. A. 4th Cir. Certiorari denied. Reported below: 472 F. 2d 875.

No. 72–1616. BOGUE ELECTRIC MANUFACTURING CORP. ET AL. *v.* ZELLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 476 F. 2d 795.

No. 72–1728. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 477 F. 2d 593.

No. 72–6859. GOODWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6956. HURSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 31.

No. 72–6991. SOLOMON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–33. AIR TERMINAL CAB, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 478 F. 2d 575.

No. 73–51. YELLOWSTONE PARK LINES, INC., ET AL. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 478 F. 2d 285.

No. 73–65. DALY *v.* WALDOR, COMMISSIONER OF HIGHWAYS OF MINNESOTA, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 296 Minn. 238, 207 N. W. 2d 541.

No. 73–66. SCHOLLE CHEMICAL CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied.

No. 73–67. IN RE NIBLACK. C. A. D. C. Cir. Certiorari denied. Reported below: 155 U. S. App. D. C. 174, 476 F. 2d 930.

No. 73–75. UNITED STATES STEEL CORP. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 482 F. 2d 439.

No. 73–80. WHITEN *v.* UNITED STATES;
No. 73–5037. KELLER *v.* UNITED STATES; and
No. 73–5079. WHITTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1346.

No. 73–85. BALDWIN COUNTY ELECTRIC MEMBERSHIP CORP. ET AL. *v.* PRICE COMMISSION ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 481 F. 2d 920.

No. 73–96. WOMACK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 1397.

No. 73–98. L & A CREATIVE ARTS STUDIO, INC., ET AL. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 478 F. 2d 1398.

No. 73–127. TOPIK ET AL. *v.* CATALYST RESEARCH CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 907.

No. 73–133. OLD DOMINION BOX CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 477 F. 2d 340.

No. 73–151. FUENTES *v.* UNITED STATES;

No. 73–5144. LARA *v.* UNITED STATES; and

No. 73–5162. ALEMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 408.

No. 73–152. FIRST BOSTON CORP. *v.* CHRIS-CRAFT INDUSTRIES, INC.;

No. 73–153. BANGOR PUNTA CORP. ET AL. *v.* CHRIS-CRAFT INDUSTRIES, INC.; and

No. 73–154. PIPER ET AL. *v.* CHRIS-CRAFT INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 480 F. 2d 341.

No. 73–155. DORAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 480 F. 2d 919.

No. 73–171. BARR ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 478 F. 2d 1152.

No. 73–174. MONDAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1404.

No. 73–180. GATEWAY CENTER CORP. *v.* MERRIAM. C. A. 3d Cir. Certiorari denied. Reported below: 476 F. 2d 1233.

No. 73–181. STATE ELECTRIC SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 749.

No. 73–182. BISHOP ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 977 and 981.

No. 73–250. HAYNE *v.* BOEING CO. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1404.

No. 73–5025. GOETZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1404.

No. 73–5040. KHOURI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5041. CROCKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 2d 1400.

No. 73–5042. MARSHALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5043. MYLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5045. TAYLOR, AKA FINDLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 618.

No. 73–5049. STREETER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5050. GUZMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 272.

No. 73–5056. HIGDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5057. OREE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5059. SAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 551.

No. 73–5060. STAMEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5062. BLACKMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 2d 1125.

No. 73–5066. D'AVANZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5069. HALL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 73–5073. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5074. MURPHY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 480 F. 2d 256.

No. 73–5075. ESTRADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5077. WALLS *v.* UNITED STATES; and
No. 73–5089. JOHNSON, AKA MOON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5078. CHODOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 479 F. 2d 661.

No. 73–5085. BEASLY *v.* UNITED STATES; and
No. 73–5097. HICKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5092. FUNGONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5093. KIRKLAND *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 46.

No. 73–5094. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5096. KELLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 476 F. 2d 211.

No. 73–5100. ORUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5101. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 1198.

No. 73–5103. HART *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 73–5107. MITCHELL *v.* CALIFORNIA BLUE SHIELD. C. A. 9th Cir. Certiorari denied.

No. 73–5113. HOLMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5118. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 595.

No. 73–5123. MANNING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1380.

No. 73–5129. MCGILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5135. BURKE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 2d 279.

No. 73–5209. CEDARGREEN *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1405.

No. 73–5211. HOPKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–1495. YALE BROADCASTING CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari and set case for oral argument. Reported below: 155 U. S. App. D. C. 390, 478 F. 2d 594.

MR. JUSTICE DOUGLAS, dissenting.

In March 1971, the FCC issued a public notice, Licensee Responsibility to Review Records Before Their Broadcast, 28 F. C. C. 2d 409, which was interpreted in many quarters as a prohibition on the playing of "drug related" songs by licensees.[1] That belief was strengthened five weeks later when the Commission's Bureau of Complaints and Compliance provided broadcasters with the names of 22 songs labeled "drug oriented" on the basis of their lyrics.[2] The industry widely viewed this as a list of banned songs, and many licensees quickly acted to remove other songs from the air as

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[1] N. Y. Times, Mar. 7, 1971, p. 28, col. 3. In some cases stations stopped playing, regardless of subject or lyric, all the works of particular artists whose views might offend the Commission. 155 U. S. App. D. C. 390, 399 n. 9, 478 F. 2d 594, 603 n. 9 (1973) (Bazelon, C. J., dissenting) (citing petitioners' joint appendix, pp. 87–88).

[2] In its subsequent order in April the Commission reported that the list of 22 songs had been identified by the Department of the Army. 31 F. C. C. 2d 379 (1971). The Commission had not consulted with the Bureau of Narcotics and Dangerous Drugs. New York Times, Mar. 28, 1971, p. 41, col. 1 (reproduced in Joint Appendix in C. A. D. C. Cir., p. 203).

well. Some announcers were fired for playing suspect songs.

In April the Commission denied a petition for reconsideration, but attempted to "clarify" its previous order. 31 F. C. C. 2d 377. But although it repudiated the list of banned songs, it reiterated the basic threat by noting that "the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area." The nature of that responsibility was unclear. The new statement indicated reaffirmation of the prior decision, yet two concurring commissioners indicated that it restored the status quo to the March notice. It seems clear, however, that the Commission majority intended to coerce broadcasters into refusing to play songs that in the Commission's judgment were somehow "drug related." The April order suggested the prescreening of songs as one method of compliance. And in subsequent testimony before Congress, the Chairman of the Commission stated that if a licensee was playing songs that in the Commission's judgment "promote the use of hard drugs," "I know what I would do, I would probably vote to take the license away." [3]

Still unsure of its responsibilities, but desiring to avoid distorting its artistic judgments by superimposing the Commission's vague sociological ones, petitioner Yale Broadcasting Company drafted its own station policy and submitted it to the Commission, asking for a declaratory ruling on whether it complied with the Commission's orders. The station proposed to fulfill its duties in this area by public service and news pro-

[3] Hearings on the Effect of Promotion and Advertising of Over-the-counter Drugs on Competition, Small Business, and the Health and Welfare of the Public before the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 92d Cong., 1st Sess., pt. 2, pp. 734–736 (1971).

gramming rather than by censoring its music. It elaborated its policy in a six-page statement. The Commission, finding the proposed policy too "abstract," declined to issue any declaratory ruling. The petitioners then brought this action, challenging the Commission's actions on First Amendment grounds, and arguing that the regulations were impermissibly vague. Petitioners also argued that they should have been the subject of formal rule-making procedures.

In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 148 (1973) (concurring in judgment), I indicated my view that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. I had not participated in the earlier opinion in *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), which placed broadcasters under a different regime, authorizing governmental regulation to ensure "fairness" of presentation. I explained in *Columbia Broadcasting, supra,* the inevitable danger resulting from placing such powers in governmental hands—a danger appreciated by the Framers of the First Amendment. "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends." 412 U. S., at 154. The instant case well illustrates those dangers.[4]

I doubt that anyone would seriously entertain the notion that consistent with the First Amendment the

[4] The rationale of *Red Lion, supra,* has now also been applied to newspapers by at least one State. See *Tornillo* v. *Miami Herald Publishing Co.,* 287 So. 2d 78 (Fla. 1973). While publishers and editors of newspapers would be surprised to learn that they were under a newly created federal bureau, such an event might not be unexpected, given the retrogressive steps that we have witnessed.

Government could force a newspaper out of business if its news stories betrayed too much sympathy with those arrested on marihuana charges, or because it published articles by drug advocates such as Timothy Leary. The proposition is so clear that rarely has the Government ever tried such a thing. See *Near* v. *Minnesota*, 283 U. S. 697 (1931). If the Government set up a new bureau with the job of reviewing newspaper stories for such "dangerous" tendencies, and with the power to put out of business those publications which failed to conform to the bureau's standards, the publisher would not have to wait until his newspaper had been destroyed to challenge the bureau's authority. The threat of governmental action alone would impose a prohibited restraint upon the press. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General*, 381 U. S. 301, 309 (1965) (BRENNAN, J., concurring). Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965).

Yet this is precisely the course taken here by the FCC. The Commission imposes on the licensees a responsibility to analyze the meaning of each song's lyrics and make a judgment as to the social value of the message. The message may be clear or obscure, and careful scrutiny would seem required. This task is to be carried out under the Commission's watchful eye and with the knowledge that repeated errors will be punished by revocation of the license. For now the regulation is applied to song lyrics; next year it may apply to comedy programs, and the following year to news broadcasts.

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964), we said that the State could not impose on newspapers the burden, under penalty of civil liability, of checking out every controversial statement for

"truth." "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Ibid.* Songs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, provide a rallying cry such as "We Shall Overcome," or express in music the values of the youthful "counterculture." The Government cannot, consistent with the First Amendment, require a broadcaster to censor its music any more than it can require a newspaper to censor the stories of its reporters. Under our system the Government is not to decide what messages, spoken or in music, are of the proper "social value" to reach the people.

I dissent.

No. 72–1498. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari and set case for oral argument. Reported below: 476 F. 2d 1196.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner here was convicted in District Court of conspiring to transport forged securities in interstate commerce, 18 U. S. C. § 2314, and of aiding and abetting the substantive crime. The trial judge's instruction to the jury did not clearly require that it find that defendant had knowledge of the interstate character of the transaction. Regardless of whether the substantive count requires such knowledge, it seems clear that

the conspiracy offense would. See the opinion of Judge Learned Hand in *United States* v. *Crimmins*, 123 F. 2d 271, 273 (CA2 1941). Moreover, here as in *Barnes* v. *United States*, 412 U. S. 837 (1973), we deal with an offense traditionally treated as a local law question; it becomes federal only through the nexus with interstate commerce. See my dissenting opinion in *Barnes* v. *United States, supra*, p. 848. Proof of that nexus is therefore required for conviction. I would grant certiorari.

No. 72–1550. ALO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In 1969 the petitioner was indicted for obstructing an investigation of the Securities and Exchange Commission, and he was convicted by a jury. Both in pretrial motions and on appeal the defendant insisted that the Government had obtained an identical indictment in 1966 but had for some reason kept it secret, and that therefore there was a three-year post-indictment delay which denied the defendant his right to a speedy trial. The Government would not confirm or deny this allegation, and the defendant was unable to produce substantiating evidence. The conviction was affirmed, the Court of Appeals concluding that in any case no prejudice was shown by the defendant. 439 F. 2d 751, 755–756 (CA2 1971). The present proceeding arises from petitioner's motion to vacate sentence, based on newly discovered evidence confirming the petitioner's earlier suspicions and revealing motivations for the delay which the District Court found were "unworthy and discreditable." The motion was denied, however, again for the reason that no prejudice had been shown, and the Court of Appeals again affirmed.

As revealed in part by a Justice Department memorandum made available to the District Court, the Govern-

ment embarked on a conscious mission to conceal the 1966 indictment to prevent disclosure of an illegal wiretap on a member of the Bar. At first the indictment was sealed. Two years later the Chief of the Fraud Section of the Criminal Division wrote a confidential memorandum to the Assistant Attorney General in charge of the Division. He pointed out that the indictment was sealed because of its factual relationship to another indictment returned the same day against a Miami attorney, who had been the subject of the "electronic surveillance." The memorandum continued: "Immediately after the return of the indictments, United States Attorney Morgenthau expressed great concern over the disclosure of these logs, because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar. Assistant United States Attorney Givens now proposes the dismissal of the indictment as to [the attorney] and the opening of the Alo indictment . . . ." The memorandum then went on to state why it might be possible to prevent disclosure of the wiretap in a prosecution of Alo, the petitioner here, an associate of the overheard attorney.

For reasons still unknown, the Government never did proceed with the 1966 indictment against the petitioner; instead it kept that indictment secret and proceeded with the new indictment, more than three years after the original 1966 indictment. Although the suspicions of the defense were aroused, as indicated above the Government was able to keep the earlier indictment and the embarrassing wiretaps secret throughout petitioner's trial.

In *Barker* v. *Wingo*, 407 U. S. 514, 533 (1972), we noted that a speedy trial is "a fundamental right of the accused" that is "specifically affirmed in the Constitution." In determining whether that right had been denied, we looked primarily to four factors: "Length

of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.*, at 530. But we cautioned that no one of these four factors is "a necessary or sufficient condition" to finding that the right to speedy trial has been denied. *Id.*, at 533.

There can be no contention that the three-year delay is "*de minimis*," and the defendant here surely cannot be faulted for failing to assert his right. See *id.*, at 525–527. The Government argues that he has made no showing of prejudice however, and on this basis alone his claim should be denied. The petitioner argues that in a case such as this, where the delay, caused by the Government, is not only unjustified but is "unworthy and discreditable," his failure to make a showing of prejudice is not crucial.

In 1963 Mr. Chief Justice Warren warned that the "fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual . . . [imposing] a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system." *Lopez* v. *United States*, 373 U. S. 427, 441 (concurring). That danger has not abated. In 1972 alone 43,000 people were overheard in 500,000 conversations pursuant to electronic surveillance authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.* Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, Table 4, pp. 12–13. (1972). There is no tally available of the electronic surveillance undertaken which does not purport to be authorized by Title III. My views on the constitutionality of electronic surveillance have been expressed before. See, *e. g. United States* v. *White*, 401 U. S. 745, 756 (1971).

Nothing in our opinion in *Barker* suggests that a finding of prejudice is necessary before relief can be granted in denial of a speedy trial; indeed, as pointed out above, the opposite is true. Cf. *Strunk* v. *United States*, 412 U. S. 434 (1973). The admitted Government misconduct here which led to the three-year delay arguably presents the kind of fact situation in which it is not necessary for the defendant to show prejudice. I would grant certiorari.

No. 72–1641. AVERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. Reported below: 475 F. 2d 27.

No. 72–1659. PATRICK *v.* FIELD RESEARCH CORP. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 30 Cal. App. 3d 603, 106 Cal. Rptr. 473.

MR. JUSTICE DOUGLAS, dissenting.

This case involves a libel suit based on statements made in the heat of the vigorous 1966 campaign for the office of Governor of California. Respondents published a poll indicating that, of the candidates in the Republican primary, petitioner was favored by only 1% of the voters. Petitioner responded by saying that he believed, based on reports from a reliable source, that the poll was corrupt, dishonest, and rigged as a result of a bribe paid by one of the other candidates. Respondents instituted a libel action and recovered $300,000 in damages.

Respondents concede public figure status and the libel award is thus based on the "malice" with which petitioner made the statements. See *Rosenbloom* v. *Metromedia*, 403 U. S. 29; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *New York Times Co.* v. *Sullivan*, 376 U. S. 254. But "[t]he requirement that malice be proved provides

at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment." *New York Times Co.* v. *Sullivan, supra,* at 293 (Black, J., concurring). In my opinion the First Amendment prohibits the use of civil libel laws to impose damages for the discussion of public affairs or criticism of public figures, and this prohibition is in no way dependent upon the results of uncertain speculation as to the "malicious" mental state of the speaker. Freedom of speech does not admit of differentiation limiting its applicability to those possessed of judicially approved states of mind.

I would grant this petition and reverse the judgment below.

No. 72–1698. IN RE PENN CENTRAL TRANSPORTATION CO. (BETHLEHEM STEEL CORP.). C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 841.

No. 72–6574. BUMGARNER *v.* RAINES, ASSISTANT U. S. ATTORNEY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6773. SHAVER *v.* SANDELL ET AL. Justice Ct., East Phoenix Precinct No. 2, Maricopa County, Ariz. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–81. COX *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 254 Ark. 1, 491 S. W. 2d 802.

No. 73–102. WILLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–161. DeCamp *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 478 F. 2d 1188.

No. 73–173. Board of Directors et al., Forbes Federal Credit Union, Charter No. 11258, Forbes Air Force Base, Topeka, Kansas *v.* National Credit Union Administration. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 477 F. 2d 777.

No. 73–184. Killebrew *v.* Security Barge Line, Inc. Sup. Ct. Miss. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 278 So. 2d 460.

No. 73–306. Securities and Exchange Commission *v.* Bangor Punta Corp. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 73–5058. Beasley *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 479 F. 2d 1124.

No. 73–5082. Gonzalez *v.* Vincent, Correctional Superintendent. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 477 F. 2d 797.

No. 73–5098. Gillon *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 491 S. W. 2d 893.

No. 73–5104. Lupino *v.* United States. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 480 F. 2d 720.

No. 73–5147. Dota *v.* United States. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 480 F. 2d 917.

No. 73–5175. TUBERVILLE *v.* TEXACO INC. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 595.

No. 72–1706. HYATT *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Ct. App. Cal., 4th App Dist. Certiorari denied.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioner seeks certiorari from the California Court of Appeal, which reversed a $55,000 jury verdict in his favor in this Federal Employers' Liability Act case. Petitioner suffered serious injuries when struck by a speeding car while crossing a highway separating respondent's yards, which have no food-serving facilities, from a diner on the other side of the highway. The court found that petitioner was acting within the scope of his employment; he was on a paid 20-minute lunch break and was on call. The court also found that there was sufficient evidence of foreseeability and avoidability to take the case to the jury. There were no stop signs on the highway, which had a 40-mile-per-hour speed limit. There was evidence that respondent knew that its employees frequently crossed the highway to the diner and had in fact constructed a path for them to the edge of the highway; that workers at times had to wait up to five minutes to cross the highway; that respondent knew of a previous accident involving one of its employees crossing the highway; but that respondent had taken no steps to mitigate the dangers to its employees.

Nonetheless, the court entered judgment *n. o. v.* for respondent, reasoning that in FELA cases the common law of negligence requires that a "duty" of the employer to the employee has to be shown, and that such

duty was not present in this case. The court, "synthesizing" past cases, found that a "duty" had been found only when (1) an employee was injured on the premises of his employer, or (2) an employee was *required* to be on the premises of a third party in the performance of duties for the employer.

The California court has limited the applicability of the FELA contrary to the purpose of Congress when it amended the Act to wipe out a host of judicially created defenses which had been engrafted on the Act. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 508–510; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 64–68. Moreover, lower federal courts have found FELA liability where an employee was injured on the premises of a third party though not required to be there by the employer to conduct the employer's business. See *Carter* v. *Union R. Co.*, 438 F. 2d 208, 210–211; cf. *Kooker* v. *Pittsburgh & Lake Erie R. Co.*, 258 F. 2d 876, 878. See also *Smalls* v. *Atlantic Coast Line R. Co.*, 348 U. S. 946, rev'g 216 F. 2d 842; *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154.

I would grant certiorari and put the case down for oral argument.

No. 72–1740. SENNOTT ET UX. *v.* RODMAN & RENSHAW. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d. 32.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACKMUN concurs, dissenting.

The petitioners brought this action in district court for securities fraud against Rodman & Renshaw (Rodman), a registered broker-dealer in securities and member firm of the New York Stock Exchange; William Rothbart, a partner in the firm; and Jordan Rothbart (Jordan), William's son. After a bench trial, the District Court found all three defendants liable. Respondent

Rodman then appealed and the Court of Appeals reversed, 474 F. 2d 32 (CA7 1973), finding no basis on which to hold Rodman liable for the concededly illegal and fraudulent scheme.

Both Sennott and Jordan were members of the Chicago Board of Trade, although Sennott had little experience in securities investments. They became acquainted and Jordan urged Sennott to open an account at Rodman through him, saying that his father had made money for other Board of Trade members. Ultimately Sennott agreed and between 1964 and 1966 his trading volume in the accounts at Rodman was more than $2 million, 70% of which was through accounts opened by Jordan.[1]

Unknown to Sennott during this period, Jordan's employment by Rodman had been terminated because of his questionable integrity, and he had no official connection with the firm after 1958. The Securities and Exchange Commission had held in a 1962 order that between 1955 and 1957 Jordan, while employed by another broker-dealer, had violated various antifraud provisions of the Securities Act. In 1958 his registration as a representative of a member of the National Association of Securities Dealers had been revoked because of deceptive practices.

In early 1964 Jordan induced Sennott to invest in a secondary offering by Skyline Homes, Inc., that Rodman was handling. Soon after, Jordan encouraged him to buy additional shares of Skyline through stock options made available to William, his father, for the father's services in underwriting the secondary offering. Sennott ultimately invested $142,000 in these options. They did not

[1] The typical transaction involved Jordan's telling Sennott that his father recommended a particular buy or sell, obtaining Sennott's agreement, and calling in the order on the special Rodman phone at the Board of Trade. The orders were processed by William Rothbart and the firm collected the regular broker's fee on them.

exist and Jordan placed the money in his wife's checking account to use in paying off trading losses. Suspicion did not arise immediately because the options were not due for delivery for seven months. After that, Jordan was able to hold off Sennott's suspicions with various stories.

In October 1964, Sennott was told that Rodman's managing partner, Carroll, wanted to talk to him. William Rothbart told Sennott that the options were none of Carroll's business and that Sennott should not cooperate. William and Jordan accompanied Sennott to his meeting with Carroll, where Carroll revealed that Sennott's checks had been deposited in Jordan's wife's account. But Sennott abided by his agreement with William not to cooperate with Carroll, and Jordan was again able to explain away this suspicious circumstance.[2] William assured Sennott he would receive the options. The truth finally dawned on Sennott in 1966 when he found that another member of the Board of Trade had been the victim of a similar scheme of Jordan's; Sennott also discovered Jordan's past at this time. Jordan was expelled from the Board of Trade.

On the basis of these facts the trial judge found Rodman, as well as Jordan and William, liable. Rodman's liability was based, *inter alia*, on § 20 (a) of the Securities Exchange Act of 1934 (15 U. S. C. § 78t), which is set out below.[3] The Court of Appeals reversed, finding

[2] Jordan had previously told Sennott that he was also buying some of the options. He explained that he had put all the money together so that he could pay for all options in one check.

[3] Section 20 (a) provides: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U. S. C. § 78t.

that there could be no liability under this section because Rodman did not have advance knowledge of the option scheme and was not involved in it.

We have said repeatedly that "the 1934 Act and its companion legislative enactments embrace a 'fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972), quoting *SEC* v. *Capital Gains Bureau*, 375 U. S. 180, 186 (1963). "'[It is essential] that the highest ethical standards prevail' in every facet of the securities industry." *SEC* v. *Capital Gains Bureau, supra*, at 186–187, citing *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 366 (1963).

Section 20 (a) provides that anyone who "controls" a person liable under the 1934 Act is equally liable, subject only to the defense of "good faith." The section "is remedial and is to be construed liberally. It has been interpreted as requiring only some indirect means of discipline or influence short of actual direction to hold a 'controlling person' liable." *Myzel* v. *Fields*, 386 F. 2d 718, 738 (CA8 1967). See 3 L. Loss, Securities Regulation 1808–1811, and cases cited in *Myzel* v. *Fields, supra*, at 738.

Rodman's liability for the acts of its partner, William Rothbart, are indisputable under § 20 (a), as they are under general principles of agency. But liability cannot be confined to those formally authorized to act in the firm's behalf, for such a rule would constrict the common-law principles of apparent authority, a construction inconsistent with the broad remedial purpose of the legislation.[4] The purpose of the Act is to expand, not restrict, the public's remedies.

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[4] "The Court does not believe that in using the word 'controls' the Congress intended that degree of control or the right to direct

Here Rodman accepted the orders placed through Jordan for over two years, collecting profits on over $2 million worth of securities transactions. It allowed Jordan to place those orders through its phone on the floor of the Board of Trade, which was under the control of a Rodman employee and was used by only two people besides Jordan—a Rodman partner and a Rodman broker. The District Court found that during this period Jordan solicited orders for Rodman in the same way from at least five others on the floor of the Board of Trade. As the Court of Appeals concedes, Rodman cannot claim lack of knowledge of these activities of Jordan's. Yet in allowing Jordan to hold himself out as an agent of Rodman, with special access because of his association with one of its partners, and accepting the considerable benefits of Jordan's activities, Rodman must be responsible for Jordan's acts even under general agency principles—which do not require even that the principal benefit from the apparent agent's fraud. Restatement (Second) of Agency §§ 261–262. Agency principles have been applied to find liability on facts almost identical to those here. *Blackburn* v. *Witter*, 201 Cal. App. 2d 518, 19 Cal. Rptr. 842 (1962). It is clear that § 20 (a) compels the same result, *SEC* v. *First Securities Co. of Chicago*, 463 F. 2d 981 (CA7), cert. denied *sub nom. McKy* v. *Hochfelder*, 409 U. S. 880 (1972).

Having knowingly acquiesced for two years in Jordan's

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necessary to make out a common law relationship of principal-agent or employer-employee." *Hawkins* v. *Merrill Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104, 123 (WD Ark. 1949), quoted in 3 L. Loss, Securities Regulation 1810. "Although the cases holding a controlling person liable usually involve employees . . . the Acts are not limited to this relationship." *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705, 710 (Minn. 1968).

usurpation of authority in order to gain the benefits, Rodman cannot suddenly disclaim liability. In the option fraud Jordan purported to act through William, a Rodman partner, just as he purported to act with Rodman's consent in the earlier sales, for which Rodman accepted the profits without complaint. In buying the options Sennott was obviously relying on Rodman's purported association with Skyline.

Nor can Rodman interpose the defense of good faith where it knew of Jordan's history of questionable practices but did nothing to warn Sennott. "[T]o satisfy the requirement of good faith [in order for a controlling person to avoid liability thereby] it is necessary for the [controlling person] to show that some precautionary measures were taken to prevent the injury suffered." *SEC* v. *First Securities Co. of Chicago, supra,* at 987. See also *Lorenz* v. *Watson,* 258 F. Supp. 724, 732 (ED Pa. 1966); *Hecht* v. *Harris, Upham & Co.,* 283 F. Supp. 417, 438 (ND Cal. 1968).

The District Court here found Rodman to be a controlling person under § 20 (a) and therefore liable to Sennott. I cannot see how that determination can be held clearly erroneous. Moreover the decision in the Court of Appeals below appears to conflict with the principles applied in *Myzel* v. *Fields, supra; SEC* v. *First Securities Co. of Chicago, supra; Anderson* v. *Francis I. duPont & Co.,* 291 F. Supp. 705 (Minn. 1968).

I would grant certiorari.

No. 72-6419. MONTOYA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, convicted of arson, bribery, and conspiracy, argues that the introduction of incriminating extra-

judicial statements of a codefendant when the codefendant was unavailable to testify because of his claim of Fifth Amendment privilege constituted a violation of petitioner's Sixth Amendment right to confront the witnesses against him. As in *Dutton* v. *Evans*, 400 U. S. 74, where this Court rejected a similar claim, I feel that the Sixth Amendment prohibits the State from putting damaging statements before the jury when the defendant has no opportunity to test those statements for truthfulness and meaning through cross-examination of the declarant. See *Dutton* v. *Evans*, *supra*, at 104 (MARSHALL, J., dissenting).

No. 72–6542. CORPUS ET AL. *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 646, 953, 956, and 1075.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioner Perales, originally convicted of a drug offense, successfully moved for a new trial. In the first trial the prosecutor had waived the habitual-offender provision for a mandatory life sentence in exchange for the petitioner's agreement to waive his right to jury trial. On retrial, petitioner exercised his right to jury trial and the prosecutor refused to waive the habitual-offender sentence enhancement provisions. As a consequence petitioner received a mandatory life sentence upon conviction. The prosecutor has stipulated that:

> "The decision made by the District Attorney of Travis County to waive the 'habitual count' of the indictment in [the first trial] was based *solely* upon the fact that the Defendant waived a jury trial. If the Defendant had waived a jury trial in [the second trial] the District Attorney of Travis County

would have again waived the 'habitual count' . . . ." Record in Ct. Crim. App. in *Perales* v. *State*, p. 38 (emphasis added).

It is well established that " 'if the only objective of a state practice is to discourage the assertion of constitutional rights it is "patently unconstitutional." ' " *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 33 n. 20; *Shapiro* v. *Thompson*, 394 U. S. 618, 631; *United States* v. *Jackson*, 390 U. S. 570, 581.

We thus held in *United States* v. *Jackson*, *supra*, that the death penalty clause in the Federal Kidnaping Statute, 18 U. S. C. § 1201 (a), which essentially insulated from the death penalty those defendants who waived the right to jury trial or pleaded guilty, imposed an impermissible burden on the exercise of Sixth Amendment rights.

Such express statutory schemes, however, are not the only mechanism for positing with an accused the necessity of determining whether the risk of greater punishment attending the exercise of constitutional rights makes that exercise too costly. A guilty plea constitutes a waiver of several fundamental rights, among them the right to jury trial. See *Santobello* v. *New York*, 404 U. S. 257, 264 (DOUGLAS, J., concurring). Plea bargaining, the extreme importance of which was recognized in *Santobello*, leaves with the prosecutor the power to set the price for the exercise of those rights. *Machibroda* v. *United States*, 368 U. S. 487, held a guilty plea voidable if induced by the prosecutor's threat to bring additional prosecutions. Yet plea bargaining would be eliminated if an accepted plea to a lesser offense was rendered constitutionally vulnerable by the prosecutor's expressed intent to otherwise proceed to trial on the crime charged.

Despite the magnitude of the constitutional issues and the important role of plea bargaining in the administration of criminal justice (see White, A Proposal for Reform of the Plea Bargaining Process, 119 U. Pa. L. Rev. 439 (1971), and Note, The Unconstitutionality of Plea Bargaining, 83 Harv. L. Rev. 1387 (1970)), this Court has never spelled out the constitutional limits of the practice. This case, in which the accused's right to jury trial was expressly burdened with the possibility of a mandatory life sentence (possibly the maximum penalty a State may exact for criminal conduct; see *Furman* v. *Georgia*, 408 U. S. 238) under the habitual offender provisions, provides an opportunity to delimit its permissible bounds. I would take that opportunity.

No. 72–6595. PUESCHEL *v.* CONNECTICUT. Ct. Common Pleas Conn., App. Div. Certiorari denied.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In *Bell* v. *Burson*, 402 U. S. 535, we struck down a Georgia statute which provided for the suspension of the licenses of drivers involved in accidents who were uninsured and were unable to post security without any presuspension consideration of fault for the accident. Petitioner's license was suspended under an essentially identical statute, and petitioner was arrested for driving without a license, prior to our decision in *Bell*. During his trial, he raised *Bell* as a defense to the criminal charge, but the Connecticut courts rejected the defense because the events complained of, the suspension and subsequent arrest, occurred prior to *Bell*. Refusal to apply *Bell* to petitioner's case on this ground is in error in view of the fact that this Court vacated and remanded for further proceedings in light of *Bell* at least three lower federal court cases challenging license suspensions which had occurred prior to our

decision in *Bell*. See *Gaytan* v. *Cassidy*, 403 U. S. 902, vacating and remanding 317 F. Supp. 46; *Pollion* v. *Lewis*, 403 U. S. 902, vacating and remanding 320 F. Supp. 1343; *Latham* v. *Tynan*, 404 U. S. 807, vacating and remanding 435 F. 2d 1248.

The State also argues that petitioner cannot raise *Bell* as a defense to his criminal charge because he has chosen not to challenge his suspension by seeking available judicial review of the suspension itself, so that he has not raised his contentions in the proper state forum. Since the state court explicitly chose not to reach this argument, we need not reach it in this Court.

Therefore, I dissent from denial of certiorari.

No. 72–6612. MONTGOMERY *v.* UNITED STATES; and No. 72–6840. MONTGOMERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 623.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners are members of the Pit River Indian Nation who, in order to construct Indian-style buildings, felled one ponderosa pine growing on the public lands of the United States, but within the original boundaries of the lands occupied by their ancestors. They were prosecuted under 18 U. S. C. § 1852, which provides in relevant part:

> "Whoever cuts . . . timber growing on the public lands of the United States . . .
>
> . . . . . .
>
> "Shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "This section shall not prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber

necessary to support his improvements, or the taking of timber for the use of the United States; *nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.*" (Emphasis added.)

In their defense, petitioners claimed that the original "aboriginal title" or "Indian title" to their ancestral tribal lands constituted a right recognized by existing law. The Court of Appeals dismissed this claim, reasoning that the specific exemptions granted miners, farmers, and the United States negatived a reading of the "existing law" clause which would include ancestral title, and noting that there was no "relevant authority" for the defense raised by petitioners.

There is, of course, no "relevant authority" for petitioners' claim, because the issue of whether the "existing law" clause of 18 U. S. C. § 1852 reaches aboriginal or Indian title has not been previously litigated.

But this Court has often held that the occupation of property by Indians' ancestors gives rise to Indian title, which, though not a property interest subject to Fifth Amendment protections, encompasses the right to occupancy and use—the right to fish, to hunt, and to cut timber sufficient for use on the land. See, *e. g., Tee-Hit-Ton Indians* v. *United States,* 348 U. S. 272, 279; *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345; *United States* v. *Cook,* 19 Wall. 591, 593–594; *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574, 584, 591 (Marshall, C. J.). This, I think, is a right recognized by the "existing law" of the United States.

A question strikingly similar to the issue in this case arose in *Cramer* v. *United States,* 261 U. S. 219, where a land grant by the United States to a railroad excepted lands "reserved . . . or otherwise disposed of." Some

of the land encompassed by the grant was occupied by three individual Indians. The United States, on behalf of the Indians, argued that the words of the exceptions clause, though obviously general, nonetheless encompassed the right of occupancy of the Indians. The Court, finding the occupancy of the individual Indians closely akin to the "original nomadic tribal occupancy" relied on by petitioners in this case, agreed with the United States because "[u]nquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy." *Id.*, at 227. The Court held that the "fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy." *Id.*, at 229.

As the Court stated in 1912,

> "[I]n the Government's dealings with the Indians . . . [t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . ." *Choate* v. *Trapp*, 224 U. S. 665, 675.

I see no reason why, in our time, that rule of construction should be nullified in the absence of any affirmative showing that Congress chose not to recognize aboriginal Indian title as a defense to 18 U. S. C. § 1852. Considering the solicitude of the Federal Government for Indian title in the past, the Court of Appeals arguably was in error in rejecting the claims of the petitioners

when it could find no "relevant authority." I would take the case and put it down for oral argument.

No. 72–6676. TANT *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 16 N. C. App. 113, 191 S. E. 2d 387.

No. 72–6778. BURT *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 234.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

In *Griffin* v. *California*, 380 U. S. 609 (1965), we held that the Fifth Amendment guarantee against self-incrimination prohibits a prosecutor from commenting to the jury upon the defendant's failure to testify at his trial. Such a practice would place a price on the defendant's invocation of his constitutional privilege—a price that would seriously undermine the value of that privilege. And in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we held that the prosecutor may not introduce into evidence statements of the accused taken while he was in police custody, unless those statements were made in compliance with procedures ensuring that the accused had understood and intelligently waived his Fifth Amendment privilege.

Indeed we said in *Miranda:*

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.*, at 468 n. 37.

This case presents a situation very much like those found constitutionally wanting in *Miranda* and *Griffin*. Here the accused apparently understood his Fifth Amendment privilege and said nothing while in police custody, and that silence was brought before the jury by the prosecutor, who argued that they could infer guilt from it. Seeking to vindicate his federal constitutional rights, the prisoner ultimately brought an action for habeas corpus in federal court, and the District Court granted the writ. The Court of Appeals reversed.

Petitioner has been convicted of murder. It was uncontested that he shot the deceased while alone with him, but petitioner maintained that the gun went off accidentally during a scuffle which began when the deceased pointed the gun at him. The petitioner was arrested later that night when the police found him asleep inside a tire store where he was once employed. Unaware of the shooting, the police charged him only with breaking and entering. They asked him no questions about the killing earlier that evening, and he volunteered no information. It was this silence—this act of not volunteering incriminating information—that was ultimately used against him.

At trial he testified in his own behalf and told his story of the accidental shooting. On cross-examination the prosecutor brought out that the defendant had not told this story to the police. The defense asked for a curative instruction to the jury, informing it that the defendant had no duty to tell the police that he had just shot someone. This was denied. Apparently encouraged, the prosecutor told the jury in summation:

> "He never told the police he accidentally shot Shorty Owens, never, at least up until the time he was lodged in Camden County Jail, and yet he is

here, sitting here today asking you to believe this story.

"If this was an accidental shooting, why didn't he go and say, 'I just accidentally shot somebody.' " *Burt* v. *Yeager*, 342 F. Supp. 188, 192 (N. J. 1972).

In upholding the conviction the court below found that *Harris* v. *New York*, 401 U. S. 222 (1971), not *Griffin*, *supra*, was controlling. In *Harris* the majority held that statements otherwise barred by *Miranda* may be introduced to impeach a defendant with the temerity to testify in his own behalf. It is argued that here, as in *Harris*, the defendant's prior statements are inconsistent. But of course here there are no prior statements; it is the defendant's silence that is used against him. The District Court, after carefully reviewing the record, found that the silence was just as consistent with the defendant's story as with the prosecution's case. In reversing, the Court of Appeals concluded otherwise. We thus seem to have come to the point where the exercise of one's constitutional rights can be offered to the jury as evidence of guilt.

We should grant this petition for certiorari.

No. 72–6906. MULLIN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 505 P. 2d 305.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner and three friends observed a case of whiskey being placed into a truck. A short time later petitioner encouraged Richard Anderson, who had not been present to see the case being put into the vehicle, to steal the spirits. Later in the day, Anderson removed the case from the truck and gave eight bottles to one of petitioner's friends, who in turn delivered three bottles to petitioner. Petitioner was arrested and convicted in the

Justice of the Peace Court for Platte County, Wyoming, of the misdemeanor offense of being a minor in possession of alcoholic beverages. A few months later petitioner was charged and convicted in the District Court of Platte County with feloniously counseling and encouraging Anderson to commit grand larceny. The Supreme Court of Wyoming affirmed, rejecting petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy, 505 P. 2d 305 (1973).

Although both the misdemeanor and felony charges arose out of the "same transaction or occurrence," they were prosecuted by the State in separate proceedings. That, in my opinion, requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, at 453–454 (1970) (BRENNAN, J., concurring); see *Miller* v. *Oregon,* 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (separate opinion of DOUGLAS, J.); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring).

No. 72–6950. MASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 2d 563.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, while attempting to enter the United States at San Ysidro, California, was subjected to a vaginal search which yielded approximately one ounce of heroin.

Subsequently she was convicted of importing the substance. Conceding that the police were justified in causing her to submit to a body cavity search under the present "clear indication" standard,[1] petitioner urges the adoption of a rule that body cavity searches must be authorized by a warrant when time permits. It has long been held that the ordinary necessity for obtaining a warrant prior to a domestic search does not apply with full force to border searches. See *Boyd* v. *United States*, 116 U. S. 616, 623; *Carroll* v. *United States*, 267 U. S. 132, 154. But the stark contrast between permitting a minor customs official to make a warrantless search of baggage and permitting that same official to determine the instances in which intrusive and degrading vaginal and rectal searches will be conducted demonstrates the necessity for a delineation by this Court of the exact parameters of the border-search exception.[2] The record in *Thompson* v. *United States*, 411 F. 2d 946, 948, indicated that 80% to 85% of all those subjected to body cavity searches at the border are innocent of the suspected wrongdoing. This statistic shows the desirability of positing ultimate decisionmaking responsibility for this type of highly intrusive search with a "neutral and detached magistrate" rather than a zealous officer "engaged in the often competitive enterprise of ferreting out crime." [3]

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[1] *Rivas* v. *United States*, 368 F. 2d 703, 710.

[2] Judges Ely and King indicated acceptance of petitioner's proposition but felt constrained by the existing law in the Ninth Circuit. A number of commentators have also argued for a warrant requirement. Note, Search and Seizure at the Border—The Border Search, 21 Rutgers L. Rev. 513 (1967). Comment, Intrusive Border Searches—Is Judicial Control Desirable?, 115 U. Pa. L. Rev. 276 (1966).

[3] *Johnson* v. *United States*, 333 U. S. 10, 14.

No. 72–6979. MEINHOLD *v.* TAYLOR ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 506 P. 2d 420.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioner was a public school teacher in Nevada. He had taught in the Clark County School District for seven years, and in his present position at one of the district's junior high schools for five years. He was notified in March 1971 that his contract would not be renewed for the following school year. The dismissal was upheld by a professional review committee after a hearing, and by the school board. In affirming their actions, the Nevada Supreme Court relied on the charge of "unprofessional conduct," which was supported solely by certain allegations concerning petitioner's views on the State's compulsory-attendance laws.

The petitioner does not believe in compulsory-attendance laws, and he did not bend his views in the hearing before the committee. He had been quoted as saying that schools are bad for children. But he never aired those views in his classroom, and he was never charged with encouraging his students to be truant.

We have held that teachers may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968). There we found that the school board's dismissal of a teacher for publishing a letter critical of the board's allocation of funds and its handling of a bond issue, was constitutionally impermissible. See also *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Shelton* v. *Tucker,* 364 U. S. 479 (1960). Just recently we

reaffirmed that principle, pointing out that it did not rely on any contractual duties: "For at least a quarter-century, this Court has made clear that . . . the government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972).

The court below does not directly question these principles. Instead, admitting there was no advocacy of truancy in the classroom, it found that "a teacher's right to teach cannot depend solely upon his conduct in the schoolroom." 506 P. 2d 420, 425–426. It then reached into the petitioner's family relationship, justifying the dismissal because of the expression of his views on attendance laws to his children, thereby "encouraging his daughters not to attend school." *Id.,* at 425. In thus "carrying out" his views on compulsory-attendance laws, the court below found that he had forfeited his rights to employment.

May Pickering publish his criticisms in the local newspaper with impunity while the petitioner must keep his views secret from his children, lest they adopt them?

I would grant the petition for certiorari and set the case for argument.

No. 73–93. STAFOS *v.* JARVIS, TRUSTEE IN BANKRUPTCY. C. A. 10th Cir. Motion to amend petition granted. Certiorari denied. Reported below: 477 F. 2d 369.

No. 73–168. DUROVIC, DBA DUGA LABORATORIES, ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 479 F. 2d 242.

No. 73–5102. WALLER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Stay order heretofore entered by the Court on June 18, 1973 [412 U. S. 947], vacated. Reported below: 270 So. 2d 26.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

Convicted by a St. Petersburg Municipal Court of violating local ordinances, in removing a canvas mural from a wall inside the City Hall of St. Petersburg, Florida, and carrying the mural through the city streets, petitioner was subsequently convicted on a charge of grand larceny for the same conduct. We granted certiorari, vacated the latter judgment, and remanded for further proceedings, holding that the state appellate court erred when it ruled that a State and its municipalities were separate sovereigns for purposes of the double jeopardy provisions of the Fifth Amendment, and for that reason rejected petitioner's double jeopardy claim. *Waller* v. *Florida*, 397 U. S. 387 (1970). On remand, the Circuit Court of Pinellas County rejected petitioner's assertion of double jeopardy on grounds—not previously reached by the state courts due to their reliance on the dual sovereignty theory—that the violations of the local ordinances and grand larceny were not the "same offense." The Florida District Court of Appeal, Second District, affirmed the judgment of conviction, 270 So. 2d 26 (1972), and the Florida Supreme Court denied a petition for a writ of certiorari.

At all times it has been conceded that the municipal and state charges arose out of the "same transaction or occurrence." See *Waller* v. *Florida*, *supra*, at 388. It is my view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States

through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances, not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, at 453–454 (1970) (BRENNAN, J., concurring); see *Miller* v. *Oregon,* 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (DOUGLAS, J., concurring); *Waller* v. *Florida, supra,* at 395 (BRENNAN, J., concurring). Under this "same transaction" test, all charges against petitioner should have been brought in a single prosecution, unless this case fell within one of the test's exceptions. See, *e. g., Ashe* v. *Swenson, supra,* at 453 n. 7, 455 n. 11. I would therefore grant the petition for certiorari and remand for further proceedings not inconsistent with the views expressed in my concurrence in *Ashe* v. *Swenson, supra.*

Assignment Order

The order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit beginning November 1973, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), ordered entered on the minutes of this Court pursuant to 28 U. S. C. § 295.

OCTOBER 23, 1973

Affirmed on Appeal

No. 72–1510. CINEMA CLASSICS, LTD., INC., ET AL. *v.* BUSCH, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, ET AL. Affirmed on appeal from D. C. C. D. Cal. MR. JUSTICE DOUGLAS, being of the view that the Fourteenth and First Amendments prohibit state obscenity regulation, would vacate so much of the judgment as is the sub-

ject of this appeal and remand for further proceedings consistent with his dissent in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70. Reported below: 339 F. Supp. 43.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Appellants appeal from so much of the judgment of the three-judge court as denied them declaratory and permanent injunctive relief in this action challenging the constitutionality of California's statutory search-and-seizure provisions (California Penal Code §§ 1523–1542), as construed and applied, and as aids in the enforcement of the underlying California obscenity statute, California Penal Code § 311.2 (a), which provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2 (a) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore vacate so much of the judgment of the District Court as is the subject of the appeal and remand

for further proceedings consistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether appellants' challenge to the constitutionality of the application of §§ 1523–1542 merits plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–128. NATIONAL RAILROAD PASSENGER CORP. *v.* MILLER, ATTORNEY GENERAL OF KANSAS, ET AL. Affirmed on appeal from D. C. Kan. Reported below: 358 F. Supp. 1321.

Appeals Dismissed

No. 72–1558. STEIN, ADMINISTRATRIX, ET AL. *v.* LEWISVILLE INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 481 S. W. 2d 436.

No. 72–6917. ZWEIG ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–5202. FELDER *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 32 N. Y. 2d 747, 297 N. E. 2d 522.

No. 73–104. KIRKPATRICK ET AL. *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J.,

dissenting)), would note probable jurisdiction in this case and reverse judgment of conviction. Reported below: 32 N. Y. 2d 17, 295 N. E. 2d 753.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Appellant booksellers were convicted in the Criminal Court of the City of New York, New York County, of promoting, or possessing with intent to promote, obscene material, knowing its content and character, in violation of N. Y. Penal Law § 235.05. Appellants challenged the constitutionality under the First and Fourteenth Amendments of N. Y. Penal Law § 235.10 (1) (Supp. 1973–1974), which establishes a presumption that a seller of obscene material knows the contents of the material he sells. Section 235.10 (1) provides as follows:

> "A person who promotes or wholesale promotes obscene material, or possesses the same with intent to promote or wholesale promote it, in the course of his business is presumed to do so with knowledge of its content and character."

Obscenity for purposes of §§ 235.05 and 235.10 is defined in § 235.00:

> "1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstance of its dissemination to be designed for children

or other specially susceptible audience." *Id.*, § 235.00 (1967).

The Criminal Court of the City of New York, New York County, rejected appellants' constitutional attack upon § 235.10. 64 Misc. 2d 1055, 316 N. Y. S. 2d 37 (1970). The Appellate Term of the New York Supreme Court, First Judicial Department, entered an order affirming the judgments of conviction. 69 Misc. 2d 212, 329 N. Y. S. 2d 769 (1971). The New York Court of Appeals, with three judges dissenting, affirmed the order of the Appellate Term. 32 N. Y. 2d 17, 295 N. E. 2d 753 (1973).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the word "obscene" in §§ 235.05 and 235.10, read as defined in § 235.00, renders §§ 235.05 and 235.10 unconstitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore vacate the judgment below and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider at this time whether, if § 235.00 were properly narrowed, appellants' challenge to the constitutionality of § 235.10

would merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–212. PROCACCINI ET AL. *v.* JONES ET AL. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that the Fourteenth and First Amendments prohibit state obscenity regulation, would vacate judgment below and remand for further proceedings consistent with his dissent in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70. Reported below: 488 S. W. 2d 543.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Appellants sought in the 44th Judicial District Court of Dallas County, Texas, to enjoin pending and future prosecutions under Texas Penal Code, Art. 527, § 3, arising out of the seizure of motion picture films alleged to be "obscene matter" within § 3. All parties agree that Texas law permits equitable intervention in a criminal proceeding if the criminal statute involved is unconstitutional, or otherwise void, and enforcement would result in irreparable injury to property rights. See *State ex rel. Flowers* v. *Woodruff*, 150 Tex. Crim. 255, 200 S. W. 2d 178 (1947). Appellants challenged the constitutionality under the First, Fifth, and Fourteenth Amendments of Art. 527, § 9 (h) Tex. Penal Code (Supp. 1972–1973), enacted as an aid to the enforcement of § 3, which is Texas' basic criminal obscenity statute. Section 9 (h) provides as follows:

> "In the event that a search warrant is issued and matter alleged to be obscene is seized under the provisions of this section, any person alleged to be in possession of the said matter or claiming ownership of the matter at the time of its posses-

sion or seizure may file a notice in writing with the magistrate within 10 days of the date of the seizure alleging that the matter is not obscene and the magistrate shall set a hearing within one day after request therefor, or at such time as the requesting party might agree, and at such hearing evidence may be presented as to the obscenity of the matter seized and at the conclusion of such additional hearing, the magistrate shall make a further determination as to the obscenity or nonobscenity of the matter. If at such hearing the magistrate finds the matter not to be obscene, then it shall be returned to the person or persons from whom it was seized."

Obscenity for purposes of Art. 527 is defined in § 1:

"(A) 'Obscene' material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

"(B) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience." *Id.*, § 1.

The 44th Judicial District Court denied appellants' request for relief. The Texas Court of Civil Appeals affirmed, holding that the appellants had failed to establish the unconstitutionality of § 9 (h). 488 S. W. 2d 543

(1972). The Supreme Court of Texas denied a writ of error and overruled a subsequent motion for rehearing.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the word "obscene" in §§ 3 and 9 (h), read as defined in § 1, renders §§ 3 and 9 (h) unconstitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore vacate the judgment below and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider at this time whether, if § 1 were properly narrowed, appellants' challenge to the constitutionality of § 9 (h) would merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–5237. HOUSE *v.* ST. AGNES HOSPITAL, INC., ET AL. Appeal from C. A. 4th Cir. dismissed for want of substantial federal question.

Certiorari Granted—Reversed. (See No. 72–1652, *ante*, p. 5.)

Certiorari Granted—Vacated and Remanded. (See also No. 72–6449, *ante*, p. 12.)

No. 72–1296. CARLSON ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari granted, judgment vacated, and

case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). Reported below: 294 Minn. 433, 202 N. W. 2d 640.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners in this case were convicted of selling obscene books and distributing obscene motion pictures in violation of a local ordinance. They argue that, in the absence of evidence of pandering, selling to minors, or the affronting of unwilling recipients, their convictions are violative of the First and Fourteenth Amendments. In support of the convictions, respondent relies on *United States* v. *Reidel*, 402 U. S. 351, and *United States* v. *Thirty-seven Photographs*, 402 U. S. 363.

In *Stanley* v. *Georgia*, 394 U. S. 557, this Court laid to rest the notion that a State may, consistent with the First Amendment, enforce an approved reading list delineating what materials the citizenry will be allowed privately to peruse. Wholly aside from my own views on what the Constitution demands with respect to obscenity regulation, I fail to comprehend how the right to possession enunciated in *Stanley* has any meaning when States are allowed to outlaw the commercial transactions which give rise to such possession and to prosecute any merchant who attempts to sell materials to all the Stanleys in this country. I would therefore grant this petition and reverse the convictions on the basis of *Stanley* v. *Georgia*, *supra*.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted on charges of selling allegedly obscene books and displaying allegedly obscene motion pictures in violation of St. Paul Legislative Code § 476.01, which provides as follows:

> "Any person who shall knowingly exhibit, sell or offer to sell any obscene, lewd, lascivious or filthy book, pamphlet, picture, motion picture, film, paper, letter, writing, print or other matter of indecent character shall be guilty of a misdemeanor."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 476.01 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Minnesota Supreme Court, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent.

No. 72–1487. TRINKLER *v.* ALABAMA. Ct. App. Ala. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139

(1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). Reported below: 49 Ala. App. 753, 272 So. 2d 282.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL concur, dissenting.

The Court today remands this case for reconsideration in light of last June's obscenity decisions. The Alabama Court of Criminal Appeals will now decide whether the publications here are obscene in accordance with standards that no one could have predicted at the time that these publications were sold. It must determine whether the sale of these publications, which were never offered to minors and never displayed publicly to unwilling bystanders, and for which purchase was never solicited, could constitutionally be prohibited because they "appeal[ed] to the prurient interest" of the average person applying local community standards, were "patently offensive" under such standards, and lacked "serious" literary, artistic, political, or scientific value. *Miller* v. *California*, 413 U. S. 15, 24.

Just recently this Court reiterated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply

> them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." [1]

The exceptions to the First Amendment written into the Constitution by the majority, which we now ask the court below to apply on remand, could not more clearly exhibit these evils of vagueness. Following the old *Roth* [2] standards, the Court adopted the approach in *Redrup* [3] of deciding each case on an *ad hoc* basis without attempting to offer guidance for future adjudications. A new majority of five now tries again, with reworked *Roth* standards which allow much freer reign to the predilections of local authorities. But this greater latitude only exacerbates the problem of vagueness.

Every author, every bookseller, every movie exhibitor, and, perhaps, every librarian is now at the mercy of the local police force's conception of what appeals to the "prurient interest" or is "patently offensive." The standard can vary from town to town and day to day in an unpredictable fashion.[4] How can an author or book-

[1] *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (internal citations and quotations omitted). See also the cases cited *id.*, at 108–109, nn. 3–5.

[2] *Roth* v. *United States*, 354 U. S. 476.

[3] *Redrup* v. *New York*, 386 U. S. 767. See the dissenting opinion of MR. JUSTICE BRENNAN in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73, at 82–83.

[4] The Dean of the Columbia University School of Library Service predicted that as a result of these vague standards "booksellers as

seller or librarian know whether the community deems his books acceptable until after the jury renders its verdict? The meaning of the standards necessarily varies according to each person's own idiosyncrasies. The standards fail to give adequate notice and invite arbitrary exercise of police power. The evil is multiplied because of the danger to First Amendment values of free expression. "Bookselling should not be a hazardous profession." *Ginsberg* v. *New York*, 390 U. S. 629, 674 (Fortas, J., dissenting).

If the magazines in question were truly "patently offensive" to the local community, there would be no need to ban them through the exercise of police power; they would be banned by the marketplace which provided no buyers for them. Thus it must be the case that some substantial portion of the public not only found them not offensive, but worthy of purchase. How can the bookseller or librarian be sure which of the publications on his shelves are offensive to the majority? Perhaps he will be safe if he sells only publications with a certified history of broad appeal, thus attempting to "steer wide of the unlawful zone." Yet there are many who deem some magazines offensive and even lingerie advertisements in the Sunday papers. A bookseller or a librarian can never know if some jury will find those views representative of the community. A movie exhibitor in Georgia has just found himself con-

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well as librarians will act as self-censors of their collections—out of fear." Librarians Vote Smut Ruling Fund, New York Times, June 25, 1973, p. 46, col. 1. The Executive Secretary of the American Booksellers Association noted that the standards subject the legitimate bookseller to fear of prosecution because he would not know which books the local authorities might deem obscene. *Ibid.* An executive of the American Library Association has reported that thousands of books have been returned to suppliers because of the booksellers' fear of prosecution. *Ibid.*

victed under that State's obscenity laws for showing a film which received much critical acclaim, and an Oscar nomination for the female lead.[5] We deal here with criminal prosecutions under which a man may lose his liberty. Our Constitution requires fair notice so that the law-abiding can conform their conduct to the requirements of the law.

This requirement is not new, and state enactments attempting to proscribe publication of certain content have run afoul of it before. In *Winters* v. *New York*, 333 U. S. 507, the Court considered a New York law which, after the gloss placed upon it by the New York courts, prohibited as obscene the publication of "collections of criminal deeds of bloodshed or lust '. . . so massed as to become vehicles for inciting violent and depraved crimes against the person . . . .'" *Id.*, at 513. In affirming the conviction, the New York court noted that "'[i]n the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals . . . .'" *Id.*, at 514. The New York court concluded: "'[W]hen reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial.'" *Ibid.* But this Court disagreed; it did not find the "continuing and changeable experience of

[5] *Jenkins* v. *State*, Georgia Supreme Court #27693, July 3, 1973. The movie, Carnal Knowledge, received an "R," not an "X" rating from the Motion Picture Association of America. See No Evil, Time, July 16, 1973, p. 73. The President of the M. P. A. A., noting that the film is a "serious work," complained that the Court's standards have left motion picture producers "in a no man's land." What the Court Has Done to Movies, New York Times, Aug. 17, 1973, p. 15, col. 1.

the community" adequate specification to support a criminal conviction, for " 'men of common intelligence' " would have to guess at the meaning of the prohibition against publication of stories " 'so massed as to become vehicles for inciting violent and depraved crimes.' " *Id.*, at 518–519.

The standards of *Miller* are no better. I dissent.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted on charges of distributing allegedly obscene materials in violation of Title 14, § 374 (4)(1), of the Code of Alabama of 1940, as amended, which provides:

> "Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court." Ala. Code Tit. 14, § 374 (4)(1) (Cum. Supp. 1971).

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments

prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 374 (4) is constitutionally overbroad, and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 494, 495 (1973) (BRENNAN, J., dissenting).

No. 72–1506. WEST *v.* TEXAS. Ct. Crim. App. Tex. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction. Reported below: 489 S. W. 2d 597.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted on charges of exhibiting

allegedly obscene matter in violation of Tex. Penal Code, Art. 527, § 3 (Supp. 1972–1973), which provides as follows:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (dissenting opinion). It is clear that, tested by that constitutional standard, Art. 527, § 3, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Texas Court of Criminal Appeals, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–1524. ROTH *v.* NEW JERSEY. Super. Ct. N. J. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*,

413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973); *Heller* v. *New York,* 413 U. S. 483 (1973); *Roaden* v. *Kentucky,* 413 U. S. 496 (1973); and *Alexander* v. *Virginia,* 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse judgment of conviction.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted on charges of possession and sale of allegedly obscene and indecent publications in violation of New Jersey Stat. Ann. § 2A:115–2 (1969), which provides as follows:

> "Any person who, without just cause, utters or exposes to the view or hearing of another, or possesses with intent to utter or expose to the view or hearing of another, any obscene or indecent book, publication, pamphlet, picture, or any mechanical or electronic recording on a record, tape, wire or other device, or other representation however made or any person who shall sell, import, print, publish, loan, give away, or distribute or possess with intent to sell, print, publish, loan, give away, design, prepare, distribute, or offer for sale any obscene or indecent book, publication, pamphlet, picture or other representation, however made, or who in any way advertises the same, or in any manner, whether by recommendation against its use or otherwise, gives any information how or where any of the same may be

had, seen, heard, bought or sold, is guilty of a misdemeanor."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 2A:115–2 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Appellate Division of the Superior Court of New Jersey, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–1646. HARDING *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that federal obscenity regulation is prohibited by the First Amendment (see *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 130 (DOUGLAS, J., dissenting)), would grant certio-

rari in this case and reverse judgment of conviction. Reported below: 475 F. 2d 480.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted in the United States District Court for the District of Colorado on charges of using an express company for carriage of allegedly obscene matter in violation of 18 U. S. C. § 1462, which provides as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character
>
> . . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,* at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Court of Appeals for the Tenth Circuit, and remand for further proceedings consistent with my dissent in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73 (1973). In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–1648. McCRARY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction. Reported below: 507 P. 2d 924.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was sentenced to 10 years in prison and fined $5,000 when convicted for selling allegedly obscene books and magazines in violation of Okla. Stat. Ann., Tit. 21, § 1021 (Supp. 1973–1974), which provides as follows:

> "Every person who wilfully . . .
>
> . . . . . .
>
> "(3) writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, book, picture, photograph, figure or form of any description . . .
>
> . . . . . .
>
> "(4) . . . is guilty of a felony and upon conviction therefor shall be punished by the imposition of a fine not less than One Hundred Dollars ($100.00)

> nor more than Five Thousand Dollars ($5,000.00) or by imprisonment for not less than thirty (30) days nor more than ten (10) years, or by both such fine and imprisonment."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 1021 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my *Paris Adult Theatre I* dissent, I would therefore grant certiorari, vacate the judgment of the Court of Criminal Appeals of Oklahoma, and remand for further proceedings not inconsistent with that dissent. *Id.*, at 73.

No. 72–1709. CHEROKEE NEWS & ARCADE, INC., ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse

the judgment of conviction. Reported below: 509 P. 2d 917.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted on charges of selling allegedly obscene materials in violation of Okla. Stat. Ann., Tit. 21, §§ 1040.8, 1040.13 (Supp. 1973). Section 1040.8, among other things, makes it "unlawful for any person to knowingly . . . sell . . . or otherwise distribute . . . any obscene book, magazine, . . . or other article which is obscene, filthy, indecent, lascivious, lewd or unfit, as defined in Title 21 of the Oklahoma Statutes, § 1040.12 . . . ." Section 1040.13 provides in relevant part that "[e]very person who, with knowledge of its contents, . . . sells, . . . any obscene, lewd, lascivious, filthy or indecent article . . . is guilty of a misdemeanor . . . ."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, §§ 1040.8 and 1040.13 are constitutionally overbroad and therefore invalid on their face. For the reasons stated in my dissenting opinion in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Oklahoma Court of Criminal Appeals, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider at this time whether other questions presented in the petition merit plenary review. See *Heller* v.

New York, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–1731. GRONER, DBA LUCKY DISTRIBUTORS *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973); *Heller* v. *New York,* 413 U. S. 483 (1973); *Roaden* v. *Kentucky,* 413 U. S. 496 (1973); and *Alexander* v. *Virginia,* 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that federal obscenity regulation is prohibited by the First Amendment (see *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123, 130 (DOUGLAS, J., dissenting)), would grant certiorari in this case and reverse the judgment of conviction. Reported below: 479 F. 2d 577.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Texas on charges of using a common carrier for carriage of allegedly obscene matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character
>
> . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

A panel of the Court of Appeals for the Fifth Circuit reversed the conviction. 475 F. 2d 550 (1972). On rehearing en banc, the panel was overruled and petitioner's judgment of conviction was affirmed. 479 F. 2d 577 (1973).

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with my dissent in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973). In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–7000. CLINE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wardius* v. *Oregon*, 412 U. S. 470 (1973). MR. JUSTICE DOUGLAS would grant certiorari and set case for oral argument. Reported below: 8 Ill. App. 3d 917, 290 N. E. 2d 622.

No. 73–259. EDWIN L. WIEGAND CO. *v.* JURINKO ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mc-*

Donnell Douglas Corp. v. *Green*, 411 U. S. 792 (1973). Reported below: 477 F. 2d 1038.

Miscellaneous Orders

No. A–323 (73–578). YASSEN *v.* UNITED STATES. C. A. 5th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 482 F. 2d 1183.

No. D–11. IN RE DISBARMENT OF HARTZOG. It is ordered that Benjamin Gerard Hartzog, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–12. IN RE DISBARMENT OF ISAACSON. It is ordered that John T. Isaacson, of St. Louis, Missouri, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–13. IN RE DISBARMENT OF LEHRER. It is ordered that Isadore Albert Lehrer, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–14. IN RE DISBARMENT OF MACLEOD. It is ordered that Douglas C. MacLeod, of St. Louis, Missouri, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–15. IN RE DISBARMENT OF SEVIN. It is ordered that Marshall Howard Sevin, of Central City, Cali-

fornia, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 72–887. AMERICAN PARTY OF TEXAS ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS [Probable jurisdiction noted, 410 U. S. 965, *sub nom. American Party of Texas* v. *Bullock*]; and

No. 72–942. HAINSWORTH *v.* WHITE, SECRETARY OF STATE OF TEXAS. [Probable jurisdiction noted, 410 U. S. 965, *sub nom. Hainsworth* v. *Bullock*.] Appeals from D. C. W. D. Tex. Motion for additional time for oral argument on behalf of appellants granted and 10 additional minutes allotted for that purpose. Appellants in No. 72–887 shall have a total of 20 minutes for oral argument and appellant in No. 72–942 shall likewise have a total of 20 minutes for oral argument. Appellee in these cases also allotted 10 additional minutes for oral argument for a total of 40 minutes. Motions of appellants for divided argument granted and it is ordered that Gloria Tanner Svanas be permitted to present oral argument on behalf of appellants in No. 72–887, and Robert H. Hainsworth, Esquire, be permitted to present oral argument *pro se* in No. 72–942.

No. 72–888. ZAHN ET AL. *v.* INTERNATIONAL PAPER CO. C. A. 2d Cir. [Certiorari granted, 410 U. S. 925.] Motion of Consumers Union of the United States, Inc., for reconsideration of order denying leave to file a brief as *amicus curiae* [*ante*, p. 812] denied.

No. 72–1371. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE *v.* "AMERICANS UNITED" INC. C. A. D. C. Cir. [Certiorari granted, 412 U. S. 927, *sub nom. Walters* v. *"Americans United" Inc.*] Motion of respondent to permit two counsel to argue orally granted.

No. 72–1465. PROCUNIER, CORRECTIONS DIRECTOR, ET AL. *v.* MARTINEZ ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 412 U. S. 948.] Motion of Boston University Center for Criminal Justice for leave to file its brief as *amicus curiae* in unprinted form denied.

No. 72–5847. ALEXANDER *v.* GARDNER-DENVER CO. C. A. 10th Cir. [Certiorari granted, 410 U. S. 925.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and a total of 15 minutes allotted for that purpose. Respondent also allotted 15 additional minutes for oral argument.

No. 73–187. KEWANEE OIL CO. *v.* BICRON CORP. ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 818.] Motions of the Bar Association of the District of Columbia and the Chamber of Commerce of the United States for leave to file briefs as *amici curiae* denied.

No. 72–6823. AULT *v.* SWENSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 73–5035. BOTTOS *v.* BEAMER, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 73–78. KAHN *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 273 So. 2d 72.

No. 73–206. PARKER, WARDEN, ET AL. *v.* LEVY. Appeal from C. A. 3d Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits and case set for oral argument with No. 72–1713 [*Secretary of the Navy* v. *Avrech*], *ante*, p. 816. Reported below: 478 F. 2d 772.

Certiorari Granted

No. 72–1570. DONNELLY *v.* DECHRISTOFORO. C. A. 1st Cir. Certiorari granted. Reported below: 473 F. 2d 1236.

Certiorari Denied. (See also No. 72–1558, *supra.*)

No. 72–1167. ALABAMA *v.* CONGO. Ct. Crim. App. Ala. Certiorari denied. Reported below: 49 Ala. App. 166, 269 So. 2d 182.

No. 72–6509. MEADOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6794. JOHNSON *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 72–6808. GRIFFIN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–6865. BRAUN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 29 Cal. App. 3d 949, 106 Cal. Rptr. 56.

No. 73–55. RALPH WILLIAMS FORD, INC. *v.* CALIFORNIA DEPARTMENT OF MOTOR VEHICLES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 30 Cal. App. 3d 494, 106 Cal. Rptr. 340.

No. 73–150. VUCI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 1403.

No. 73–166. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–169. MESSINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 878.

No. 73–177. GOLDSTEIN, RECEIVER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–179. WEST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–197. FRANK ET AL. *v.* WOLF ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 467.

No. 73–211. SHELTON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 694, 195 S. E. 2d 369.

No. 73–222. RIBLET TRAMWAY CO. *v.* SIMON. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 289, 505 P. 2d 1291.

No. 73–224. ROSE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1406.

No. 73–226. STARK ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 131.

No. 73–227. CONTINENTAL BAKING CO. *v.* OLD HOMESTEAD BREAD CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 476 F. 2d 97.

No. 73–228. NEW JERSEY COUNTY AND MUNICIPAL COUNCIL NO. 61 ET AL. *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 478 F. 2d 1156.

No. 73–229. SAFIR *v.* BLACKWELL, ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–230. PENNSYLVANIA *v.* GROCE. Sup. Ct. Pa. Certiorari denied. Reported below: 452 Pa. 15, 303 A. 2d 917.

No. 73–234. SAFEGUARD MUTUAL INSURANCE CO. *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 455 Pa. 632, 303 A. 2d 822.

No. 73–237. HENRIKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–238. MOYNAHAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 73–245. DRASKOVICH ET AL. *v.* PASALICH ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: See — Ind. —, 280 N. E. 2d 69.

No. 73–251. MEILY *v.* AGRICULTURAL INVESTMENT CORP., S. A., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 258 So. 2d 519.

No. 73–252. UNITED STATES ET AL. *v.* SARKISIAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 472 F. 2d 468.

No. 73–253. LEMAR TOWING CO., INC. *v.* FIREMAN'S FUND INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 609.

No. 73–261. TEXTILE WORKERS UNION OF AMERICA, AFL–CIO *v.* KAYSER-ROTH CORP. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 2d 524.

No. 73–430. DICKEY ET AL. *v.* ROBINSON ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 62 N. J. 473, 303 A. 2d 273 and 63 N. J. 196, 306 A. 2d 65.

No. 73–5061. FRYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5068. CLEMENTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5087. BOLAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5108. SPEAKMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–5120. MARSHALL *v.* UNITED STATES; and
No. 73–5140. HARMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 73–5131. ALVAREZ-RODRIGUEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–5136. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 481 F. 2d 425.

No. 73–5141. GARDNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 929.

No. 73–5142. EATMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5143. HOUSE *v.* CLERK, U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 73–5155. SERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5171. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 601.

No. 73–5172. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–5174. JOHNSON, AKA ANDERSON, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5187. GUSTAVE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5199. SCOPOLITES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 115, 277 So. 2d 389.

No. 73–5210. HALLINAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5212. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–5215. DUFFY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 479 F. 2d 1038.

No. 73–5219. BARKLEY *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5223. MCCRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 286.

No. 73–5225. CHANDLER *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 73–5229. COLE *v.* CHEVRON CHEMICAL CO., ORONITE DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 361.

No. 73–5231. PAYNE *v.* LOWERY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–5233. MARSHALL *v.* YOUNG. Ct. App. D. C. Certiorari denied.

No. 73–5235. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 1249.

No. 73–5236. BARGAR *v.* OHIO CIVIL RIGHTS COMMISSION ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 73–5238. STEVENSON *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 73–5241. AIKENS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5243. ANDERSON *v.* FRODERMAN ET AL. C. A. 1st Cir. Certiorari denied.

No. 72–1511. DICKINSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motions to dispense with printing *amici curiae* briefs of National Association of Broadcasters and Reporters Committee for Freedom of the Press denied. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 373.

No. 72–1543. DRUMGO *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 8 Cal. 3d 930, 506 P. 2d 1007.

No. 72–1684. SCHU *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–107. MANUSZAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–244. MAIN LINE BOARD OF REALTORS ET AL. *v.* COLLINS ET AL. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 452 Pa. 342, 304 A. 2d 493.

No. 73–248. MCCORD ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5080. LEGATO *v.* UNITED STATES; and

No. 73–5090. MIGDALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 408.

No. 73–5159. MATUSEWITCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 174.

No. 73–5166. MOORE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 158 U. S. App. D. C. 375, 486 F. 2d 1139.

No. 73–5193. COBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 196.

No. 73–5244. RYLES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Mass. ——, 296 N. E. 2d 816.

No. 72–1568. NEW JERSEY *v.* WRIGHT. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 475 F. 2d 1397.

No. 72–1578. HARTEL, ADMINISTRATRIX *v.* LONG ISLAND RAILROAD CO. C. A. 2d Cir. Certiorari denied. Reported below: 476 F. 2d 462.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioner's husband, a ticket agent of the respondent railroad, was required to open the ticket office of the Mineola, Long Island, station in the early hours of a Sunday morning. In order to open the steel shutter covering the ticket window it was necessary to leave the security of the ticket office and enter the passenger waiting room. Since there was no peephole in the shutter or in the door leading to the waiting room, there was no way for the agent to view the waiting room from the

ticket office. Upon entering the waiting room, petitioner's husband encountered armed robbers who shot and killed him. Petitioner brought this suit to recover damages under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

In *Lillie* v. *Thompson,* 332 U. S. 459, this Court held that the Act provides relief for breach by a railroad of its duty to protect employees from foreseeable third-party assaults. In order to demonstrate foreseeability in this case, petitioner offered to prove 10 robberies or attempted robberies at respondent's stations located between five and 30 miles of the Mineola station. All had occurred within four years, and two occurred in the month immediately preceding the Mineola holdup. Petitioner further offered to prove communications between the ticket agents' union and respondent relating the dangers of armed robbery and requesting the installation of peepholes and silent alarms. Since none of the prior robberies occurred at the Mineola station and none of the union communications made specific reference to the dangers at that particular station, the evidence was excluded.

After finding that petitioner had "introduced no evidence showing that [respondent] should have reasonably foreseen the possibility of a holdup at the Mineola Station," the District Court granted respondent's motion for a directed verdict. 356 F. Supp. 1192, 1194.

As this Court has repeatedly pointed out, Congress expressed a strong preference for jury determinations of actions arising under the Act. See *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 508. When the evidence is viewed in the light most favorable to petitioner, I conclude that a fair-minded juror could well conclude that failure to provide a peephole was negligence and that this negligence played some part in the agent's

death. The District Court thus erred in taking this case from the jury. *Gallick* v. *B. & O. R. Co.*, 372 U. S. 108; *Rogers* v. *Missouri Pacific R. Co., supra.*

The District Court also erred in disallowing evidence which tended to establish respondent's knowledge of the hazards which ticket agents faced. Whether it was reasonable for respondent to refrain from implementing safety suggestions at the Mineola station until the wave of robberies reached that station was for the jury to determine. The evidence of robberies at other stations and of union warnings about the dangers of robberies was relevant to that determination.

I would vacate the judgment below and remand for a new trial.

No. 72–6539. FIORINI *v.* WAYNE CIRCUIT JUDGE. Sup. Ct. Mich. Motion to strike respondent's memorandum denied. Certiorari and other relief denied.

No. 72–6931. LAWRENCE GAY LIBERATION FRONT ET AL. *v.* UNIVERSITY OF KANSAS ET AL. C. A. 10th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari denied.

No. 73–26. ALBERS, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN join, dissenting.

The five petitioners in this case own virtually all the outstanding stock of a small corporation, A & S Transportation Co. (A & S). The company operates a barge. The barge fell into such disrepair as to require replacement, but A & S lacked the necessary resources and credit. A & S requested the Federal Maritime Commission to guarantee, as it is empowered by law to do,

a proposed first mortgage loan from a bank. Before the Commission would extend its guarantee, it required of A & S at least $150,000 of additional private capital. The Commission presented A & S with two options. A & S could resort either to subordinated debt or to the issuance of nonvoting, nondividend paying, noncumulative preferred stock unredeemable until full payment of the desired loan.

A & S chose the latter course. In proportion to their holdings of A & S common, petitioners in 1959 purchased $150,000 of preferred stock possessing all the attributes required by the Commission. The loan was then consummated with the Commission's guarantee, and A & S purchased a replacement vessel. By 1964 the loan was paid off in full. Having no further need for the $150,000, and in accord with the wishes of petitioners,[1] A & S redeemed the preferred stock in 1965 and 1966 in two equal installments. No premium was paid, and *petitioners received precisely the amount each had previously invested.* The Commissioner of Internal Revenue treated the redemptions as the receipt of ordinary income, taking the view that they were "essentially equivalent to a dividend" within the meaning of § 302 (b)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 302 (b)(1). Citing *United States* v. *Davis,* 397 U. S. 301 (1970), the Tax Court agreed. *Miele* v. *Commissioner,* 56 T. C. 556 (1971); *La Fera Contracting Co.* v. *Commissioner,* T. C. Memo 1971–161. The Court of Appeals for the Third Circuit affirmed without published opinions. *Miele* v. *Commissioner,* 474 F. 2d 1338 (1973); *La Fera Contracting Co.* v. *Commissioner,* 475 F. 2d 1395 (1973); *Spiniello* v. *Commissioner,* 475 F. 2d 1396 (1973).

[1] One may understand the desire of petitioners to have their capital contributions returned, as the preferred stock was nondividend paying.

On the above facts it seems plain that the redemption of preferred stock provided petitioners nothing more than a return of the capital they were compelled by the Commission to pay into A & S to obtain the additional financing the corporation needed to remain in business. To tax that return of capital at ordinary income rates is an extraordinary result, yet one that I recognize to be mandated by the full sweep of *United States* v. *Davis, supra.* Because of strong doubts as to the correctness of any decision that produces such a bizarre result, I would grant certiorari to reconsider *Davis.*[2]

Section 302 (b)(1) of the Code shelters from dividend treatment, and accompanying potential ordinary income consequences, any stock redemption that "is not essentially equivalent to a dividend."[3] A majority of the Court in *Davis* read that provision to mean that a stock redemption by a small, closely held corporation

[2] I am not unaware of the importance of *stare decisis,* especially with respect to the tax Code. Yet, even in the tax area, the Court has recognized that the policies underlying *stare decisis* do not require "adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940).

[3] The section treats such redemptions as tax-recognizable exchanges of stock, which generally means that the capital gains provisions are applicable, to the extent that there is any return above basis. Section 302 provides, in pertinent part:

"Distributions in redemption of stock.

"(a) General Rule. If a corporation redeems its stock . . . , and if paragraph (1) . . . of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

"(b) Redemptions treated as exchanges.

"(1) Redemptions not equivalent to dividends. Subsection (a) shall apply if the redemption is not essentially equivalent to a dividend."

is "*always* 'essentially equivalent to a dividend'" where there is no "change in the relative economic interests or rights of the stockholders." 397 U. S., at 307, 313 (emphasis added). Undoubtedly the Court sought to promote ease of administration through adoption of a simplistic, *per se* rule. Yet the Court explicitly recognized that the weight of authority in the lower federal courts was contrary to its mechanical approach. *Id.*, at 303 n. 2. Furthermore, the Court conceded that the "legislative history is certainly not free from doubt." *Id.*, at 311.

In my view, the result produced by *Davis* in this case is justified neither by the language of the Code nor by the legislative history, and certainly not by precedent prior to *Davis*. In these circumstances, ease of administration is too high a price to pay for the presumably unforeseen and undeniably harsh consequences visited on these and similarly situated taxpayers.

The Tax Court noted petitioners' position "that the preferred stock was no longer needed after the loan had been paid in full and that redemption of the stock was consistent with the business purpose for which the stock was issued." *Miele* v. *Commissioner*, 56 T. C., at 567. The Tax Court did not refute the factual correctness of this position, or consider whether there had been a tax evasion motivation.[4] Rather, that court simply disregarded all factual considerations as immaterial to an application of the *Davis per se* rule:

> "We consider [petitioners'] argument as having been foreclosed and the issue determined by the case of *United States* v. *Davis*, 397 U. S. 301 (1970).

[4] No finding was made by the Tax Court, for example, that an earned surplus was available from which ordinary dividends could have been paid.

> In *Davis*, the United States Supreme Court held that a redemption without a change in the relative economic interests or rights of the stockholders is always essentially equivalent to a dividend under section 302 (b)(1). It is the effect of the redemption and not the purpose behind it which is determinative of dividend equivalence." *Ibid.* (Citations omitted.)

MR. JUSTICE DOUGLAS, dissenting in *Davis* with the concurrence of THE CHIEF JUSTICE and MR. JUSTICE BRENNAN, viewed the majority opinion as reading § 302 (b)(1) out of the Code:

> "When the Court holds it [the redemption under consideration in *Davis*] was a dividend, it effectively cancels § 302 (b)(1) from the Code. This result is not a matter of conjecture, for the Court says that in the case of closely held or one-man corporations a redemption of stock is 'always' equivalent to a dividend." 397 U. S., at 314.

The Tax Court's decision in this case abundantly bears out MR. JUSTICE DOUGLAS' view. In light of the deliberate retention of the "essentially equivalent to a dividend" language in the 1954 revision of the Code, most courts prior to *Davis* had assumed that § 302 (b)(1) required a factual determination as to the business purpose of the stock redemption.[5] Had such a factual inquiry been made in this case, it is evident that the result would have been different.

In addition to the presence of a legitimate business purpose and the absence of any evidence of tax evasion, the preferred stock in question here was nondividend paying—a highly unusual provision for a preferred

[5] See cases cited in *United States* v. *Davis*, 397 U. S. 301, 303 n. 2 (1972).

stock. Thus petitioners, having been induced by the Commission to advance additional private capital to A & S, found themselves either locked in without income on their investment or compelled, as the price of recouping it, to pay taxes at ordinary income rates on a nonexistent gain. It is difficult to think of a more unjust result, and yet this is the inevitable consequence of the sweeping *Davis* requirement that a redemption "always" be deemed " 'essentially equivalent to a dividend' " in the absence of "a change in the relative economic interests or rights of the stockholders." 397 U. S., at 307, 313.[6]

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[6] This one qualification (namely, a change in the relative economic interests or rights of stockholders) may immunize from *Davis* consequences the larger corporations, where a congruity of interest between common and preferred stockholders is found far less frequently than in the family type of small corporations. But even where it can fairly be said (and often the facts as to this are ambiguous) that there has been no such change, this does not mean that minority stockholders are not severely penalized by the *Davis* rule. In this case, the Tax Court noted that the redemption was made at the insistence of petitioners, who were in the unhappy position of holding nondividend preferred stock. But nothing in *Davis* protects a minority stockholder in a close corporation (and their number is legion) who may have little or no influence as to whether or when preferred stock is redeemed. If the majority shareholders in such a corporation effect a *pro rata* redemption, a minority shareholder has no means to avoid *Davis* consequences In this connection, the language of the Senate Finance Committee in restoring the "essentially equivalent" language to § 302 of the Code is relevant. The Senate Committee stated that the House bill, which had deleted this language, "appeared unnecessarily restrictive, particularly, in the case of redemptions of preferred stock which might be called by the corporation without the shareholder having any control over when the redemption may take place." S. Rep. No. 1622, 83d Cong., 2d Sess., 44 (1954). See *United States* v. *Davis*, *supra*, at 310. The truth is that minority shareholders, even in close corporations, frequently have no such control.

One may recognize the tax-avoidance concern underlying the Court's opinion in *Davis* [7] without concluding that the only remedy with respect to closely held corporations is "always" to tax stock redemptions as dividends without regard to facts and circumstances. It may indeed have been reasonable to create a rebuttable presumption in favor of the Government, but it is difficult to see a justification for a result as harsh and inequitable as that often produced by the *Davis* rule. Moreover, if Congress' purpose was to enact the *Davis per se* rule, it could have been expressed in the simplest language.[8] As the Court notes in *Davis*, the Senate Finance Committee deliberately chose not to take that option. *Id.*, at 310–311.

In my view the *Davis* rule, often a trap for unwary investors in small businesses and facially contrary to the relevant Code provision, should be reconsidered.

No. 73–134. COLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Motion to dispense with printing petition

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[7] See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 9–2 (3d ed. 1971).

[8] It has been suggested that since *Davis* was decided March 23, 1970, Congress has had more than three years to repudiate or ameliorate the *Davis per se* rule. With all respect, this suggestion seems unrealistic. Congress has had under consideration during this period a general revision of the Code as well as a broad re-examination of many of the fundamental assumptions underlying the present Code. It is unlikely that piecemeal adjustments would have been made during this period of study and re-examination. Furthermore, the *Davis* rule falls most heavily on small family corporations unlikely to have specialized tax counsel capable of warning that *Davis* has converted § 302 (b) (1) into "a treacherous route to be employed only as a last resort." B. Bittker & J. Eustice, *supra* n. 7, at 9–9. It is these very corporations that are least likely to make their voices heard in Congress, since they have limited "lobbying" capabilities.

granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–142. COLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Motion to dispense with printing petition granted. Certiorari denied.

No. 73–199. ANDRUS ET AL. *v.* CONVOY CO. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 480 F. 2d 604.

No. 73–236. NEW JERSEY CITIZENS FOR CLEAN AIR, INC., ET AL. *v.* NEW JERSEY SPORTS & EXPOSITION AUTHORITY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 62 N. J. 248, 300 A. 2d 337.

No. 73–5206. GELB *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

Rehearing Denied

No. 27, Orig. OHIO *v.* KENTUCKY, 410 U. S. 641. Motion for leave to file petition for rehearing as to denial of State of Ohio for leave to amend its original complaint denied.

No. 71–1270. MCKEE *v.* UNITED STATES, 407 U. S. 910. Motion for leave to file fourth petition for rehearing denied. [For earlier orders herein, see *e. g.*, 412 U. S. 914.]

OCTOBER 29, 1973

Dismissal Under Rule 60

No. 73–15. COMMUNICATIONS SATELLITE CORP. ET AL. *v.* SHANNON. Sup. Jud. Ct. Me. Petition for writ of

certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 302 A. 2d 582.

NOVEMBER 5, 1973

Dismissal Under Rule 60

No. 73–5124. HOLIFIELD *v.* MISSISSIPPI. Sup. Ct. Miss. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 275 So. 2d 851.

Affirmed on Appeal

No. 73–320. PIRINCIN ET AL. *v.* BOARD OF ELECTIONS OF CUYAHOGA COUNTY ET AL. Affirmed on appeal from D. C. N. D. Ohio. Reported below: 368 F. Supp. 64.

No. 73–336. CATOOR ET AL. *v.* BLAIR ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 358 F. Supp. 815.

Appeals Dismissed

No. 72–1582. JOHNSON *v.* CITY OF CHEYENNE ET AL. Appeal from Sup. Ct. Wyo. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 504 P. 2d 1081.

No. 73–10. JOHNSON *v.* LARAMIE COUNTY SCHOOL DISTRICT No. 1. Appeal from Sup. Ct. Wyo. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 506 P. 2d 817.

No. 72–1612. CONNOR *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 253 Ark. 854, 490 S. W. 2d 114.

No. 72–6799. CANFIELD *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of substantial federal question. Reported below: 506 P. 2d 987.

No. 72–6880. SMITH ET UX. *v.* REEDER ET UX. Appeal from Ct. App. Okla. dismissed for want of substantial federal question.

No. 73–273. MONTENEGRO ET AL. *v.* NEW JERSEY ET AL.; and

No. 73–274. MEADOWLANDS REGIONAL DEVELOPMENT AGENCY ET AL. *v.* NEW JERSEY ET AL. Appeals from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 63 N. J. 35, 304 A. 2d 545.

No. 73–275.* ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. *v.* LOUISIANA;

No. 73–335. ILLINOIS CENTRAL RAILROAD CO., NOW ILLINOIS CENTRAL GULF RAILROAD *v.* LOUISIANA;

No. 73–340. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LOUISIANA;

No. 73–341. TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS *v.* LOUISIANA; and

No. 73–342. LOUISIANA & ARKANSAS RAILWAY CO. *v.* LOUISIANA. Appeals from 24th Jud. Dist. Ct. La., Jefferson Parish, dismissed for want of substantial federal question. MR. JUSTICE POWELL took no part in the consideration or decision of these appeals.

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*[Reporter's Note: This order is reported as amended on November 19, 1973, *post*, p. 1037.]

No. 72–1630. BOARD OF EDUCATION OF TRI-VALLEY CENTRAL SCHOOL DISTRICT No. 1 OF TOWN OF NEVERSINK ET AL. *v.* BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF THE SOLE SUPERVISORY DISTRICT OF SULLIVAN COUNTY. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 31 N. Y. 2d 1020, 294 N. E. 2d 657.

No. 73–5303. DUN LEAVAY *v.* LUTZ APPELLATE PRINTERS, INC., ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction.

No. 72–6749. OWENS *v.* GOLD, DISTRICT ATTORNEY OF KINGS COUNTY. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Affirmed. (See No. 72–6915, *ante*, p. 17.)

Certiorari Granted—Reversed. (See No. 72–1366, *ante*, p. 14; and No. 73–5245, *ante*, p. 29.)

Certiorari Granted—Vacated and Remanded. (See also No. 73–5002, *ante*, p. 25.)

No. 72–1576. LITTLE ART CORP. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836. MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is

prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari in this case and reverse the judgment of conviction. Reported below: 189 Neb. 681, 204 N. W. 2d 574.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted on charges of circulating and publishing allegedly obscene motion pictures in violation of Neb. Rev. Stat. § 28–921, which provides as follows:

> "Whoever knowingly sells or offers for sale, or gives to another, or otherwise circulates or publishes or causes to be circulated or published, or has in his possession with intent to sell, loan, or give to another, or to otherwise circulate or publish or cause to be circulated or published, any obscene, lewd, indecent, or lascivious book, pamphlet, paper, movie films, drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument or article of obscene, lewd, indecent or lascivious use, or advertises the same for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased or otherwise obtained or made, shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both. . . ."

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit

the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (dissenting opinion). It is clear that, tested by that constitutional standard, § 28–921 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Supreme Court of Nebraska, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–4. GAY TIMES, INC. *v.* LOUISIANA. Sup. Ct. La. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836. MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari in this case and reverse the judgment of conviction. Reported below: 274 So. 2d 162.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted on charges of exhibiting

allegedly obscene motion pictures in violation of La. Rev. Stat. Ann. § 14:106 (A)(2) (Supp. 1973), which provides as follows:

> "A. Obscenity is the intentional:
>
> . . . . .
>
> "(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character."

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (dissenting opinion). It is clear that, tested by that constitutional standard, § 14:106 (A)(2) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Supreme Court of Louisiana, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions

presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 72–6914. ROBBINS *v.* TENNESSEE. Ct. Crim. App. Tenn. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the decision of the Supreme Court of Tennessee in *Franklin* v. *Tennessee*, 496 S. W. 2d 885. MR. JUSTICE DOUGLAS would grant certiorari and set case for oral argument. Reported below: 496 S. W. 2d 524.

Miscellaneous Orders

No. A–335. HEUTSCHE *v.* UNITED STATES. C. A. 7th Cir. Reapplication for bail presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application.

No. A–352 (73–5426). O'REILLY *v.* UNITED STATES. C. A. 8th Cir. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 486 F. 2d 208.

No. A–420. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO. C. A. 3d Cir. Motion of respondent to vacate stay entered by MR. JUSTICE BRENNAN on October 25, 1973, denied. Reported below: 483 F. 2d 656.

No. A–421. KAPLAN *v.* AMALGAMATED LITHOGRAPHERS OF AMERICA, LOCAL ONE, ET AL. C. A. 3d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. [Motion for leave to file bill of complaint granted, *ante*, p. 810.] It is ordered that Mr. Justice Clark (retired) be, and he

is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereinafter may direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 72–914. SCHEUER, ADMINISTRATRIX *v.* RHODES, GOVERNOR OF OHIO, ET AL.; and

No. 72–1318. KRAUSE, ADMINISTRATOR, ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. [Certiorari granted, 413 U. S. 919.] Motion of Mexican American Legal Defense & Educational Fund for leave to file a brief as *amicus curiae* granted.

No. 72–1154. FOLEY ET AL. *v.* BLAIR & CO., INC., ET AL. C. A. 2d Cir. [Certiorari granted, 411 U. S. 930.] Consideration of respondents' suggestion of mootness deferred to hearing of case on the merits.

No. 72–1168. UNITED STATES *v.* MAZE. C. A. 6th Cir. [Certiorari granted, 411 U. S. 963.] Motion of respond-

ent for appointment of counsel granted. It is ordered that William T. Warner, Esquire, of Louisville, Kentucky, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 72–1410. EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN. C. A. 7th Cir. [Certiorari granted, 412 U. S. 937.] Motion of NLSP Center on Social Welfare Policy and Law, Inc., for leave to file a brief as *amicus curiae* granted.

No. 72–6520. LAU ET AL. *v.* NICHOLS ET AL. C. A. 9th Cir. [Certiorari granted, 412 U. S. 938.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioners granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 72–6902. GOODING *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 907.] Motion of petitioner for appointment of counsel granted. It is ordered that Herbert A. Rosenthal, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 73–187. KEWANEE OIL CO. *v.* BICRON CORP. ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 818.] Motion of petitioner with respect to limited printing of record granted.

No. 73–298. VELA ET AL. *v.* VOWELL, COMMISSIONER OF PUBLIC WELFARE OF TEXAS, ET AL. Appeal from D. C. W. D. Tex. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 75–5340. DIGGS *v.* PALMAN ET AL. Motion for leave to file petition for declaratory and mandatory relief denied.

No. 72–6921. RICHARDSON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO;

No. 73–5335. CAMPBELL *v.* WALKER, WARDEN; and

No. 73–5343. WILLIAMS *v.* HENDERSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 72–1454. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 472 F. 2d 596.

No. 73–263. COMMISSIONER OF INTERNAL REVENUE *v.* IDAHO POWER CO. C. A. 9th Cir. Certiorari granted. Reported below: 477 F. 2d 688.

No. 72–1513. SHEA, EXECUTIVE DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF COLORADO, ET AL. *v.* VIALPANDO. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 475 F. 2d 731.

Certiorari Denied. (See also Nos. 72–1582, 73–10, and 72–6749, *supra.*)

No. 72–1428. ELLER ET AL. *v.* VAUGHNS ET AL.; and

No. 72–1737. BOARD OF EDUCATION OF PRINCE GEORGES COUNTY ET AL. *v.* VAUGHNS ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–1499. TSOI *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 489 S. W. 2d 103.

No. 72–1619. HARDY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 169, 193 S. E. 2d 459.

No. 72–6750. BOYD *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 597.

No. 72–6756. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–6772. BELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 964.

No. 72–6791. WATKINS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 17, 194 S. E. 2d 800.

No. 72–6820. REED *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 72–6846. JARAMILLO *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 85 N. M. 19, 508 P. 2d 1316.

No. 72–6847. ATTWOOD *v.* PATTERSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–6851. DOVER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 150, 193 S. E. 2d 477.

No. 73–19. IN RE CROWNE. Sup. Ct. Fla. Certiorari denied. Reported below: 276 So. 2d 477.

No. 73–156. TEXAS *v.* BURKHALTER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 493 S. W. 2d 214.

No. 73–172. FOWLER ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 128 Ga. App. 501, 197 S. E. 2d 502.

No. 73–185. BURNS *v.* UNITED STATES;

No. 73–186. MCCOLLUM ET AL. *v.* UNITED STATES; and

No. 73–5179. JENKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–193. JEFFERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 1004.

No. 73–198. ABRAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 476 F. 2d 1067.

No. 73–214. CARDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1362.

No. 73–240. CHRISTOPHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–257. HAWKINS ET AL. *v.* NORTH CAROLINA BOARD OF DENTAL EXAMINERS. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 378, 194 S. E. 2d 540.

No. 73–264. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* SAM KANE PACKING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 1128.

No. 73–266. BORYS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 597.

No. 73–268. POLCOVER *v.* SECRETARY OF THE TREASURY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 155 U. S. App. D. C. 338, 477 F. 2d 1223.

No. 73–269. HEART OF THE BLACK HILLS STATIONS *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 73–271. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 280.

No. 73–276. LANDRY *v.* HEMPHILL, NOYES & CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 473 F. 2d 365.

No. 73–277. MISSOURI PACIFIC RAILROAD CO. *v.* PETERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 490.

No. 73–278. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied.

No. 73–279. RIZZO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 479 F. 2d 688.

No. 73–280. CHRISTENSEN ET AL. *v.* NEW YORK TIMES CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 374.

No. 73–282. CHALONEC *v.* PRUDENTIAL LINES, INC. C. A. 2d Cir. Certiorari denied.

No. 73–284. AMALGAMATED LOCAL UNION 355 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–286. REESE *v.* KASSAB, SECRETARY, DEPARTMENT OF TRANSPORTATION OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–288. PRATT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 275, 278 So. 2d 724.

No. 73–290. DOUGLAS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 19 Ariz. App. 375, 507 P. 2d 987.

No. 73–291. SPORTS DIVERSIFIED, INC. ET AL. *v.* NATIONAL BANK OF COMMERCE OF TULSA ET AL. Ct. App. Okla. Certiorari denied.

No. 73–293. CITY OF NORTH LAS VEGAS *v.* COUNTY OF CLARK, NEVADA, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: — Nev. —, 504 P. 2d 1326.

No. 73–294. ZIMMERMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 73–299. MESA OIL CO. *v.* BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 2d 491.

No. 73–301. HOWARD, TRUSTEE *v.* COUNTY OF WELD ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–302. DEUTSCHE DAMPFSCHIFF. GES. "HANSA" *v.* CUMMINS SALES & SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 498.

No. 73–303. MARTIN, TRUSTEE IN BANKRUPTCY *v.* MIZRAHI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 801.

No. 73–308. COTA *v.* CHANDLER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–310. ALLEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–311. SMITH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–313. FRASER *v.* CONTINENTAL REALTY CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1341.

No. 73–316. NATIONAL ASSOCIATION OF WOMEN'S & CHILDREN'S APPAREL SALESMEN, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 479 F. 2d 139.

No. 73–319. CLARK ET AL. *v.* UNITED BANK OF DENVER NATIONAL ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 235.

No. 73–322. BAUM ET AL. *v.* LEFRAK FOREST HILLS CORP. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 796, 298 N. E. 2d 685.

No. 73–323. HEGYES *v.* SOUTH RIVER RESCUE SQUAD. C. A. 6th Cir. Certiorari denied.

No. 73–329. MARRA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 481 F. 2d 1196.

No. 73–330. RUIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 477 F. 2d 918.

No. 73–331. SALIK ET AL. *v.* UNITED CALIFORNIA BANK. C. A. 9th Cir. Certiorari denied.

No. 73–333. INDIANA REAL ESTATE COMMISSION ET AL. *v.* SATOSKAR. C. A. 7th Cir. Certiorari denied.

No. 73–338. CARR *v.* VANN, COUNTY COMMISSIONER OF THOMAS COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 594.

No. 73–349. WINEGLASS RANCHES, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. C. A. 9th Cir. Certiorari denied.

No. 73–5009. MEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5013. HOLTZINGER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–5016. SAXON *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 73–5021. HESBETT, AKA McIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 566.

No. 73–5044. CUTHRELL *v.* DIRECTOR, PATUXENT INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 475 F. 2d 1364.

No. 73–5065. MILLS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 124.

No. 73–5091. PERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1276.

No. 73–5095. HILL *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–5105. EASLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 475 F. 2d 1401.

No. 73–5110. WILLIAMSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 927.

No. 73–5111. SHARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5117. BLANK *v.* UNITED STATES;

No. 73–5145. GORNISH *v.* UNITED STATES; and

No. 73–5177. WEINBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 478 F. 2d 1351.

No. 73–5126. FLEMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5127. FLEMMONS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5128. HARLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 515.

No. 73–5130. ZWILLICH *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5132. DIXON *v.* UNITED STATES; and
No. 73–5191. FANNING ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 45.

No. 73–5137. RICKUS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 480 F. 2d 919.

No. 73–5139. ORAND, AKA BEAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5148. HARDISON *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–5149. BEASLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 922.

No. 73–5150. O'BRIEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5154. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 73–5167. ESQUER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 459 F. 2d 431.

No. 73–5170. CHINN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 276 So. 2d 456.

No. 73–5176. RILEY *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5182. HOUSDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–5184. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5189. MARTINEZ-RODRIGUEZ ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–5197. KACZYNSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5200. PETERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 157 U. S. App. D. C. 219, 483 F. 2d 1222.

No. 73–5208. NEWMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 222.

No. 73–5213. FAWCETT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 1406.

No. 73–5216. BENEDETTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5220. CURRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5222. WALKER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 304 A. 2d 290.

No. 73–5224. WALTERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 2d 386.

No. 73–5227. WILCOXSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5239. ABERCROMBIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 961.

No. 73–5242. BRUCE *v.* CACHERIS ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5246. HARRIS *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 111 R. I. 147, 300 A. 2d 267.

No. 73–5247. MILES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 2d 1217.

No. 73–5248. PALMER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5249. MACK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5252. SWEENEY *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5253. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 354.

No. 73–5254. MCKINLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5255. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 199.

No. 73–5262. GIBSON *v.* ZIEGELE, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 479 F. 2d 773.

No. 73–5263. MITCHELL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–5264. LEWIS *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 480 F. 2d 920.

No. 73–5266. IMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 197.

No. 73–5267. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–5268. JOHNSON *v.* DAILEY. C. A. 8th Cir. Certiorari denied. Reported below: 479 F. 2d 86.

No. 73–5270. CLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 133.

No. 73–5271. TAYLOR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5274. TYRA ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 75.

No. 73–5275. GRECO *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 189 Neb. 817, 205 N. W. 2d 550.

No. 73–5276. SELLERS *v.* VANCE, DISTRICT ATTORNEY OF HARRIS COUNTY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–5277. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1401.

No. 73–5279. EVANS *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5281. BLOETH *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 73–5285. GRANATO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 493 S. W. 2d 822.

No. 73–5286. CHATMAN ET AL. *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 109 Ariz. 275, 508 P. 2d 739.

No. 73–5287. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5289. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 339.

No. 73–5291. COLLINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 837.

No. 73–5294. ESSER *v.* SCOTT ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–5295. GOMORI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5298. SLAUGHTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5300. WILLIAMS *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 73–5301. HARRISON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 73–5307. HINES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 161, 277 So. 2d 905.

No. 73–5310. ATONICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 481 F. 2d 935.

No. 73–5312. BEDGOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 595.

No. 73–5329. SORIO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5332. MONSOUR *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 73–5333. GRECO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–5350. WAHRLICH *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 479 F. 2d 1137.

No. 73–5351. HUNT *v.* ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 73–5363. HARRINGTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 527, 196 S. E. 2d 742.

No. 72–1624. CLAYTOR *v.* RUNGE ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–6918. MOORE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 32 N. Y. 2d 67, 295 N. E. 2d 780.

No. 72–6933. BETHEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 275 So. 2d 254.

No. 73–109. MILLENSON *v.* NEW HOTEL MONTELEONE, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 736.

No. 73–325. BROWN ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5012. MAUCH *v.* SALMON, JUDGE. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5183. TAYLOR *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Ind. ——, 295 N. E. 2d 600.

No. 73–5207. HUDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 251.

No. 73–5302. WEBB *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 190.

No. 73–34. ROSS ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 5th Cir. Motion for leave to substitute Mrs. John Ross et al. in place of John Ross, deceased, as party petitioners granted. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 474 F. 2d 989.

No. 73–56. WILLIAMS *v.* TEXAS. Ct. Crim App. Tex. Motion to dispense with printing petition granted. Motion of respondent to dispense with printing brief in opposition denied. Certiorari denied. Reported below: 492 S. W. 2d 522.

No. 73–258. UNITED STATES *v.* SCAFO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 480 F. 2d 1312.

No. 73–262. RAMIREZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 2d 76.

MR. JUSTICE DOUGLAS, dissenting.

I would grant and reverse for the reasons set forth by Judge Hufstedler in the Court of Appeals, 480 F. 2d 76.

The majority had affirmed on *Bradley* v. *United States*, 410 U. S. 605. Judge Hufstedler said:

> "Section 1103 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 provides in pertinent part: 'Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals . . . made by [it] or abated by reason thereof.' The keystone of the *Bradley* rationale is its construction of the word 'prosecutions' in section 1103 (a) as 'clearly import[ing] a beginning and an end.' The 'end,' as *Bradley* squarely held, is the conclusion of sentencing. The 'beginning' of a prosecution is the return of an indictment. These indictments were returned after section 176a had been repealed. There was no prosecution to be saved by section 1103 (a). *Bradley* means that any prosecution initiated before repeal of the statute carries with it the old section 176a penalty. Conversely, any prosecution under section 176a begun after repeal of section 176a for the substantive offense committed before repeal carries with it the milder penalties of the successor statute.
>
> "The substantive offense was specifically saved. Prosecutions initiated before repeal were 'not . . . affected' ar 'abated.' Prosecutions begun after repeal of section 176a could be neither affected nor abated, because they were nonexistent when the old statute was repealed." 480 F. 2d, at 79.

That is my view.

No. 73–337. SEVEN-UP CO. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 478 F. 2d 755.

No. 73–5201. DELLE ROSE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

By an earlier *per curiam* opinion in this case, this Court reversed the judgment of the Court of Appeals which had affirmed a District Court judgment granting Delle Rose's petition for a writ of habeas corpus. See *LaVallee* v. *Delle Rose,* 410 U. S. 690 (1973). In the view of a majority of the Court, the courts below erred in holding that the state courts had not made an "adequate" determination within the meaning of 28 U. S. C. § 2254 (d) that Delle Rose's confession was voluntary. Since an "adequate" state court determination had been made, the District Court was wrong in imposing on the State the burden of showing voluntariness by a preponderance of the evidence. Rather, under the terms of the presumption in § 2254 (d), the burden was on Delle Rose "to establish in the District Court by convincing evidence that the state court's determination was erroneous." 410 U. S., at 695. The Court therefore remanded the case "for further proceedings consistent with this opinion"—presumably referring to a redetermination by the District Court of the voluntariness issue under a corrected allocation of the burden of proof.

Upon receiving the mandate from this Court, however, the Court of Appeals did not remand the case to the District Court for such a redetermination. Instead, without explanation, it remanded with instructions to dismiss the petition. In my view, the Court of Appeals thereby not only misconstrued this Court's opinion, but also deprived petitioner of his constitutional and statutory right to attempt "to establish by convincing evidence

that the factual determination by the State court was erroneous." 28 U. S. C. § 2254 (d).

At the outset, it seems clear from a reading of the earlier *per curiam* decision that this Court never even addressed, let alone decided, the question of whether petitioner had satisfied his burden of proving erroneous the state court finding of voluntariness. Nor would it have been proper to have done so. Neither the District Court nor the Court of Appeals had yet confronted the question, having mistakenly placed the burden of proof on the State. As we have said in similar circumstances, "it is not our function to deal with this issue in the first instance." *Swenson* v. *Stidham*, 409 U. S. 224, 231 (1972).

This case would not be so troublesome but for the fact that the record indicates that the District Court might well find the confession involuntary, even were the burden of proof assigned to petitioner. Indeed, in granting the petition in the first place, the District Court remarked: "Far from satisfying the State's burden of showing voluntariness by a preponderance, the evidence preponderates heavily the other way." *United States ex rel. Delle Rose* v. *LaVallee*, 342 F. Supp. 567, 574 (SDNY 1972) (citation omitted). And certainly there is ample evidence in the record to support that factual finding. In the words of the District Court, this was

> "a case of a man of little education and poor understanding of the language; racked with physical pain and psychological distress; weakened by hunger and lack of sleep; questioned for long hours by teams of vigorous and increasingly hostile officers; not told of his rights to silence, counsel, etc., but given by tone and manner to understand that each questioner 'has a right to, and expects, an

> answer'; shoved before television cameras after six hours or so of being moved about and assailed by his questioners in the police station; subjected to the coercion of a reenactment (including the forced placement of his hand into the seat back torn by the lethal pellets and wet with his late wife's blood) which he perceived with powerful reason as compulsory, hostile and ultimately damaging to his claims of innocence; then, finally, overpowered by the macabre—if, fortunately, rare—stunt of a visit to the morgue, with pious explanations thereafter . . . that serve only to highlight the quality of relentless manipulation." *Id.*, at 574–575 (footnotes omitted).

It may be that the Court of Appeals did not feel that petitioner had satisfied his burden of proof. But again, the question was not for that court in the first instance, but rather for the District Judge, to whose "sound discretion must be left in very large part the administration of federal habeas corpus." *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). Of course, any factual finding by the District Court would be subject to review by the Court of Appeals under the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52 (a). In the first instance, however, the factual finding belongs to the trier of fact, the court which had an opportunity to hear petitioner's story and observe his demeanor, not a court of appeals.

By preventing the District Court from considering whether petitioner could prove by convincing evidence that the state court determination of voluntariness was erroneous, the Court of Appeals, now with this Court's acquiescence, in effect turned the presumption of correctness in § 2254 (d) into an irrebuttable presumption. In my view, such a result plainly foreclosed petitioner's constitutionally guaranteed opportunity to seek relief

on federal habeas corpus upon proving that his detention violates his fundamental rights. See *Townsend* v. *Sain, supra,* at 312. I would grant the writ of certiorari, reverse the judgment of the Court of Appeals, and remand the case to the District Court with instructions to reconsider, under the burden of proof set forth in this Court's earlier *per curiam* opinion, whether petitioner's confession was voluntary. I respectfully dissent.

Rehearing Denied

No. 72–6798. GERNAND *v.* UNITED STATES, *ante,* p. 844. Petition for rehearing denied.

No. 72–1440. OLENZ *v.* MAROVITZ, U. S. DISTRICT JUDGE, ET AL., *ante,* p. 877. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

NOVEMBER 12, 1973

Affirmed on Appeal

No. 73–359. PENNSYLVANIA ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. M. D. Pa. Reported below: 361 F. Supp. 208.

Appeal Dismissed

No. 73–378. FULD ET AL. *v.* ELLIOTT, CHAIRMAN, CITY PLANNING COMMISSION, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question.

Certiorari Granted—Affirmed. (See Nos. 72–1733 and 72–6748, *ante,* p. 31.)

Certiorari Granted—Vacated and Remanded

No. 73–270. EAKES *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115

(1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari in this case and reverse the judgment of conviction. Reported below: — S. D. —, 206 N. W. 2d 272.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted on charges of possessing with intent to exhibit an obscene film in violation of S. D. Comp. Laws Ann. § 22–24–12 (Supp. 1973), which provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, by any means, into this state for sale or distribution, or in this state, prepares, writes, composes, stereotypes, prints, publishes, sells, offers to sell, keeps for sale, exhibits, makes, distributes, offers to distribute, or has in his possession with intent to distribute, or to exhibit or to offer to exhibit, any obscene matter, is guilty of a misdemeanor."

Obscenity for purposes of § 22–24–12 is defined by § 22–24–11 (1) as

> "that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme or purpose an appeal to prurient interest."

It is my view that "at least in the absence of distribu-

tion to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 22–24–12, in conjunction with § 22–24–11 (1), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Supreme Court of South Dakota, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–5054. BUSH *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. On representation of the Solicitor General set forth in his memorandum for the United States filed October 17, 1973, judgment vacated and case remanded for reconsideration in light of the position presently asserted by the Government. Reported below: 476 F. 2d 1094.

Miscellaneous Orders

No. A–472. BANKS *v.* HOLDER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Application for acceleration of filing of petitions for writs of certiorari presented to MR JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. D–16. IN RE DISBARMENT OF MADES. It is ordered that Herbert S. Mades of Winthrop, Massachusetts, be suspended from the practice of law in this Court

and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–17. IN RE DISBARMENT OF ENGLERT. It is ordered that Charles E. Englert of Boston, Massachusetts, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–18. IN RE DISBARMENT OF STANTON. It is ordered that John J. Stanton of Boston, Massachusetts, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 72–1125. ALLEE ET AL. *v.* MEDRANO ET AL. Appeal from D. C. S. D. Tex. [Probable jurisdiction noted, 411 U. S. 963.] Motion of Mexican American Legal Defense and Educational Fund for leave to file an untimely brief as *amicus curiae* denied.

No. 72–1660. BLACKLEDGE, WARDEN, ET AL. *v.* PERRY. C. A. 4th Cir. [Certiorari granted, *ante*, p. 908.] Motions of respondent for leave to proceed *in forma pauperis* and for appointment of counsel granted. It is ordered that James E. Keenan, Esquire, of Durham, North Carolina, a member of the Bar of this Court be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–297. ALLIANCE FOR CONSUMER PROTECTION, HILL DISTRICT BRANCH, ET AL. *v.* MILK MARKETING BOARD OF PENNSYLVANIA ET AL. Pa. Commw. Ct. Motion to dispense with printing petition denied with leave to file a printed petition in conformity with Rule 39

of the Rules of this Court on or before December 12, 1973.

No. 73–5121. BANKSTON *v.* SALCINES ET AL. D. C. M. D. Fla. Motion for leave to file petition for writ of certiorari denied.

No. 73–5392. KOCHEL *v.* UNITED STATES;

No. 73–5419. WION *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL.; and

No. 73–5465. HIGHTOWER *v.* MICHIGAN ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–368. HERNANDEZ *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.;

No. 73–5365. MAGEE *v.* NELSON, WARDEN, ET AL.; and

No. 73–5379. O'CLAIR *v.* EDENFIELD, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 72–1613. HUFFMAN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO ET AL.; and

No. 73–5486. O'CLAIR *v.* FREEMAN, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 73–328. LEHMAN *v.* CITY OF SHAKER HEIGHTS ET AL. Sup. Ct. Ohio. Certiorari granted. Reported below: 34 Ohio St. 2d 143, 296 N. E. 2d 683.

Certiorari Denied

No. 72–1388. SELENBERG *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 270 So. 2d 848.

No. 72–1657. F. H. McGRAW & Co. *v.* FELLOWS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 473 F. 2d 465.

No. 72–1719. BENDER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 865.

No. 72–6710. BJERKAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1351.

No. 72–6764. FITZGERALD *v.* WILLIAMS. Ct. App. D. C. Certiorari denied.

No. 72–6874. NICHOLS *v.* CLANON, PRISON SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 72–6892. HEBERLING *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 507 P. 2d 1.

No. 73–46. NEW ORLEANS STEAMSHIP ASSN. *v.* GENERAL LONGSHORE WORKERS, I. L. A., LOCAL UNION No. 1418 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 73–72. PEERLESS PRESSED METAL CORP. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: See 451 F. 2d 19.

No. 73–140. AGRASHELL, INC. *v.* HAMMONS PRODUCTS CO. C. A. 8th Cir. Certiorari denied. Reported below: 479 F. 2d 269.

No. 73–146. WINN *v.* FLORIDA STATE BOARD OF NURSING. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 73–178. BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, ET AL. *v.* MAPP ET AL.; and

No. 73–188. BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA ET AL. *v.* MAPP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 851.

No. 73–196. SCLAFANI *v.* UNITED STATES; and
No. 73–351. ROSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 245.

No. 73–201. TRACEY *v.* JANCO, SHERIFF. C. A. 4th Cir. Certiorari denied.

No. 73–260. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–267. BARAL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 741.

No. 73–304. CIANCIOTTI ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–305. HOLLEY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–309. LAGATTUTA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–314. CRAIG, ADMINISTRATRIX *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 479 F. 2d 35.

No. 73–315. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–317. CHAMBERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 929, 506 P. 2d 311.

No. 73–321. MUSGRAVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 327.

No. 73–332. SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, ET AL. *v.* RUSSO. C. A. 3d Cir. Certiorari denied. Reported below: 483 F. 2d 7.

No. 73–343. DONLON ET UX. *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 479 F. 2d 317.

No. 73–350. WATSON *v.* NEVADA NATIONAL BANK. C. A. 9th Cir. Certiorari denied.

No. 73–353. ABBOTT ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 384.

No. 73–355. MAY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 254 Ark. 194, 492 S. W. 2d 888.

No. 73–356. RIVA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied.

No. 73–357. 2,431.4 ACRES OF LAND, MORE OR LESS, SITUATED IN HANCOCK COUNTY, MISSISSIPPI, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 1389.

No. 73–358. JONES ET UX. *v.* CREDIT BUREAU OF NASHVILLE. C. A. 6th Cir. Certiorari denied.

No. 73–363. NIX *v.* GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS. C. A. 5th Cir. Certiorari denied. Reported below: 479 F. 2d 382.

No. 73–365. O'CONNOR *v.* O'CONNOR ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 274 So. 2d 546.

No. 73–367. LOSERS, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–371. WELLS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 270 So. 2d 399.

No. 73–372. HARVEY *v.* SAULNIER ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–373. ALASKA BARITE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 73–385. WOMACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 327.

No. 73–387. MOBIL OIL CORP. *v.* WOOLARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 479 F. 2d 557.

No. 73–388. JENNINGS *v.* BOENNING & CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 482 F. 2d 1128.

No. 73–5011. COSTELLO *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 73–5024. RODRIGUEZ *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 73–5052. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 491 S. W. 2d 924.

No. 73–5116. NORRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 595.

No. 73–5164. BROWN *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–5165. SUMMERVILLE *v.* BRITTON, REFORMATORY SUPERINTENDENT. C. A. 8th Cir. Certiorari denied.

No. 73–5196. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5218. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 479 F. 2d 1138.

No. 73–5240. HAMLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 556.

No. 73–5283. MAYFIELD *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 594.

No. 73–5293. CONNER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–5296. CASTANEDA-CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5304. MADDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 482 F. 2d 850.

No. 73–5306. WHITMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 1028.

No. 73–5309. MCKENNA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1406.

No. 73–5318. HARRIS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5319. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5320. OGLESBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 213.

No. 73–5326. LYON *v.* UNITED STATES; and

No. 73–5330. IRION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 1240.

No. 73–5328. DYER *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 73–5334. DURHAM *v.* MACDONALD. C. A. 8th Cir. Certiorari denied.

No. 73–5336. OLDEN *v.* MCCARTHY. C. A. 9th Cir. Certiorari denied.

No. 73–5352. SAILER *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 73–5356. SOLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 482 F. 2d 105.

No. 73–5358. FONTANA *v.* STATE ROADS COMMISSION OF MARYLAND ET AL. Ct. App. Md. Certiorari denied.

No. 73–5361. RENDEL *v.* GOMES, PRISON SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–5362. HAMBURG ET UX. *v.* JONES ET UX. Sup. Ct. Wyo. Certiorari denied. Reported below: 510 P. 2d 791.

No. 73–5373. SALLAS *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied.

No. 73–5374. HAMMONDS *v.* MANTIA ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–5378. MARTINEZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 19 Ariz. App. 417, 508 P. 2d 82.

No. 73–5382. LOMBARDI *v.* GORDON ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5384. BRINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5395. MCKINNEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 271, 278 So. 2d 719.

No. 72–1699. MUSCOLINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 1404.

No. 72–6934. SISKE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6988. NELSON *v.* RAILSBACK ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–352. BRASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 1405.

No. 73–374. UNION EQUITY COOPERATIVE EXCHANGE, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 812.

No. 73–377. OSSER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 727.

No. 73–5188. NASIRIDDIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 16 Md. App. 479, 298 A. 2d 490.

No. 73–5381. ROBERTSON *v.* STONE, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6784. CHASE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 509 P. 2d 171.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was stopped by Deputy Sheriff James Leland Johnston for driving on the wrong side of the highway.

Petitioner and the passengers in his car then overpowered the deputy and took his .38-caliber service revolver. Using that gun, petitioner forced the deputy to drive to two different houses where the deputy was kicked and beaten. Petitioner finally released the deputy after taking his wallet. Petitioner was tried and convicted by a jury in Muskegee County, Oklahoma, for the offense of kidnaping for extortion and was sentenced to a term of 35 years' imprisonment. Subsequently, the State brought separate charges against petitioner for his possession of the deputy's service revolver. After a jury trial in Tulsa County, Oklahoma, petitioner was convicted for the offense of carrying a firearm, after former conviction of a felony (the former felonies were other than the kidnaping conviction), and sentenced to a term of 10 years' imprisonment. The Oklahoma Court of Criminal Appeals modified petitioner's term of imprisonment to five years, but otherwise affirmed the conviction, rejecting petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy. See 509 P. 2d 171 (1973).

Although the charges of kidnaping for extortion and carrying a firearm, after former conviction of a felony, both arose out of the same transaction or episode, they were prosecuted by the State in separate proceedings. That, in my opinion, requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in extremely limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Miller* v. *Oregon,* 405 U. S. 1047 (1972)

(BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring).

No. 72–6785. HYSAW *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was sentenced to eight years' imprisonment upon his plea of guilty to a charge of burglary. Later on the same day, the same conduct was the basis of a charge of theft, for which he received a consecutive eight-year sentence when he also pleaded guilty to that charge. Although neither conviction was directly appealed, petitioner sought state habeas corpus, claiming that, since both charges arose out of the same criminal transaction, his second conviction for theft violated his constitutional protection against double jeopardy. Petitioner's application was denied by the 179th District Court of Harris County and the Texas Court of Criminal Appeals.

Brief for Respondent in Opposition 2 conceded that the charges of burglary and theft arose out of the same criminal transaction. That, in my opinion, requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in extremely limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Miller* v. *Oregon*, 405 U. S. 1047 (1972) (BRENNAN, J., dissenting);

Harris v. *Washington*, 404 U. S. 55, 57 (1971) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring).

No. 72-6919. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 491 S. W. 2d 257.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

After petitioner and one Edward Johnson forcefully entered a St. Louis apartment occupied by Mrs. Hermine Rohs, her son Willy Rohs, and his wife Marilyn Rohs, robbed them, raped both women, and finally stabbed all three to death, petitioner was indicted on three separate charges of murder in the first degree.* The State proceeded first with the trial of petitioner for the murder of Marilyn Rohs, seeking the death penalty. The jury convicted petitioner of first-degree murder, but assessed punishment at life imprisonment. Subsequently, the State tried petitioner for the murder of Willy Rohs, again seeking the death penalty. Again the jury found petitioner guilty of first-degree murder and assessed life imprisonment. The trial judge specified that the second life sentence would run consecutively to the first and the State thereupon entered a plea of *nolle prosequi* on the third indictment. The Missouri Supreme Court affirmed both convictions, rejecting petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy. See 491 S. W. 2d 257 (1973).

Although both charges of murder clearly arose out of the same transaction or episode, they were prosecuted by the State in separate proceedings. That, in my

*Edward Johnson, who was also indicted, tried, and convicted for first-degree murder, has not petitioned this Court to review his conviction.

opinion, requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in extremely limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Miller* v. *Oregon*, 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring).

No. 73–25. HAMMONS PRODUCTS CO. *v.* AGRASHELL, INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 479 F. 2d 269.

No. 73–369. FIRCH BAKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 479 F. 2d 732.

No. 73–254. DORL *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition granted. Certiorari denied.

No. 73–379. SULLIVAN ET AL. *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 475 F. 2d 1071.

No. 73–5437. CHANDLER ET AL. *v.* CENTRAL OF GEORGIA RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR.

JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–339. EMPLOYEE-OFFICER JOHN *v.* JOHNSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 481 F. 2d 1028.

No. 73–442. NEW YORK *v.* FITZPATRICK. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 32 N. Y. 2d 499, 300 N. E. 2d 139.

Rehearing Denied

No. 72–6535. RODRIGUEZ *v.* UNITED STATES, *ante*, p. 864;

No. 72–6538. ARIAS *v.* UNITED STATES, *ante*, p. 864;

No. 72–6737. RODRIGUES *v.* UNITED STATES, *ante*, p. 841;

No. 72–6787. WEATHERS *v.* GAFFNEY, WARDEN, *ante*, p. 872;

No. 72–6837. JOSEPH *v.* HENDERSON, WARDEN, *ante*, p. 846;

No. 72–6905. REID *v.* WISCONSIN, *ante*, p. 880;

No. 72–6939. JOHNSTON *v.* UNITED STATES, *ante*, p. 850;

No. 73–2. KAEHNI ET AL. *v.* DIFFRACTION CO., *ante*, p. 854; and

No. 73–135. KING NUT CO. *v.* BEER NUTS, INC., *ante*, p. 858. Petitions for rehearing denied.

No. 72–1271. BRUMBAUGH *v.* UNITED STATES, 412 U. S. 918. Motion to dispense with printing petition granted. Motion for leave to file petition for rehearing denied.

No. 72–5462. LEE *v.* TEXAS, 409 U. S. 1046. Motion for leave to file petition for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the week of November 26, 1973, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Eastern District of New York during the month of December 1973, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period April 15, 1974, to April 19, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

NOVEMBER 19, 1973

Affirmed on Appeal

No. 73–415. TITUS *v.* SUPREME COURT OF VIRGINIA ET AL.; and

No. 73–416. BROWN *v.* SUPREME COURT OF VIRGINIA ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE WHITE would note probable jurisdiction and set cases for oral argument. Reported below: 359 F. Supp. 549.

No. 73–426. DANFORTH, ATTORNEY GENERAL OF MISSOURI *v.* RODGERS ET AL. Affirmed on appeal from D. C. W. D. Mo.

Appeals Dismissed

No. 73–382. PORTLAND PIPE LINE CORP. *v.* ENVIRONMENTAL IMPROVEMENT COMMISSION ET AL.; and

No. 73–383. AMERICAN OIL CO. ET AL. *v.* ENVIRONMENTAL IMPROVEMENT COMMISSION ET AL. Appeals from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. MR. JUSTICE STEWART would dismiss appeals for want of properly presented federal question. MR. JUSTICE POWELL took no part in the consideration or decision of these appeals. Reported below: 307 A. 2d 1.

No. 73–404. DEPENDENT SCHOOL DISTRICT NO. D–20 OF CADDO COUNTY ET AL. *v.* PARKER, COUNTY SUPERINTENDENT OF SCHOOLS. Appeal from Sup. Ct. Okla. dismissed for want of substantial federal question.

No. 73–5391. WOOD *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 214 Va. 97, 197 S. E. 2d 200.

No. 73–5314. MITCHELL *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist. Motion of California Applicant's Attorneys Assn. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of a properly presented federal question.

Vacated and Remanded on Appeal

No. 73–399. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.; and

No. 73–420. UNITED STATES ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET

AL. Appeals from D. C. D. C. Judgment vacated and cases remanded for further consideration in light of *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U. S. 800 (1973). MR. JUSTICE POWELL took no part in the consideration or decision of these appeals.

Certiorari Granted—Vacated and Remanded

No. 72–6681. ELDER *v.* CASEY ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Middle District of Tennessee for reconsideration in light of suggestion contained in the Solicitor General's memorandum filed October 26, 1973. MR. JUSTICE BLACKMUN would grant certiorari and set case for oral argument.

Miscellaneous Orders

No. A–486. ENVIRONMENTAL DEFENSE FUND ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. D. C. E. D. Tenn. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 371 F. Supp. 1004.

No. A–425 (73–5481). SAYLES *v.* MCGUIRE, U. S. DISTRICT JUDGE. D. C. D. C. Application for injunction presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–19. IN RE DISBARMENT OF MCWHINNEY. It is ordered that Robert R. McWhinney, of Greensburg, Pennsylvania, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–20. IN RE DISBARMENT OF LEVIN. It is ordered that Robert Bernard Levin, of New York City, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–21. IN RE DISBARMENT OF LIDDY. It is ordered that George Gordon Liddy, of Oxon Hill, Maryland, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 73–187. KEWANEE OIL CO. *v.* BICRON CORP. ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 818.] Motion of SCM Corp. for access to totality of appendix denied.

No. 73–275. ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. *v.* LOUISIANA;

No. 73–335. ILLINOIS CENTRAL RAILROAD CO. *v.* LOUISIANA;

No. 73–340. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LOUISIANA;

No. 73–341. TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS *v.* LOUISIANA; and

No. 73–342. LOUISIANA & ARKANSAS RAILWAY CO. *v.* LOUISIANA. Order of this Court entered November 5, 1973, dismissing appeals for want of substantial federal question is amended by deleting sentence which reads "MR. JUSTICE POWELL took no part in the consideration or decision of No. 73–275" and substituting in lieu thereof "MR. JUSTICE POWELL took no part in the consideration or decision of these appeals."*

*[REPORTER'S NOTE: The order of November 5, 1973, is reported as so amended, *ante*, p. 991.]

No. 73–431. BROCCOLINO, JUDGE *v.* MARYLAND COMMISSION ON JUDICIAL DISABILITIES ET AL. Ct. App. Md. Motion to dispense with printing petition denied with leave to file a printed petition in conformity with Rule 39 of the Rules of this Court on or before December 19, 1973.

No. 73–5192. MAYER *v.* MOEYKENS. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 73–232. EXXON CORP. *v.* PRESTON. Appeal from Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this matter. Reported below: 487 S. W. 2d 956.

Certiorari Granted

No. 73–235. DEFUNIS ET AL. *v.* ODEGAARD ET AL. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Reported below: 82 Wash. 2d 11, 507 P. 2d 1169.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari granted. Cases consolidated and a total of one and one half hours allotted for oral argument. Reported below: 484 F. 2d 215.

Certiorari Denied

No. 73–326. BYRD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 307, 475 F. 2d 418.

No. 73–334. MATANKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 1319.

No. 73–366. WOLCOFF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 1406.

No. 73–389. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 484 F. 2d 309.

No. 73–390. SHAPIRO ET AL. *v.* BARRETT, COUNTY CLERK OF COOK COUNTY, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 54 Ill. 2d 237, 296 N. E. 2d 342.

No. 73–391. BEHRING PROPERTIES, INC., ET AL. *v.* SUN OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 310.

No. 73–395. YUEN SANG LOW ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 479 F. 2d 820.

No. 73–397. BRAND PLASTICS CO. ET AL. *v.* DOW CHEMICAL CO. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 124.

No. 73–400. REXACH ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 482 F. 2d 10.

No. 73–408. SANTOS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 35.

No. 73–409. GORDON ET AL., CO-ADMINISTRATORS *v.* LIGHTENBURGER ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: —— Nev. ——, 510 P. 2d 865.

No. 73–410. Soo Line Railroad Co. *v.* Fulton, dba R. H. Fulton, Contractor; and

No. 73–577. Fulton, dba R. H. Fulton, Contractor *v.* Soo Line Railroad Co. et al. C. A. 8th Cir. Certiorari denied. Reported below: 481 F. 2d 326.

No. 73–412. Iannelli et ux. *v.* Long, District Director of Internal Revenue, et al. C. A. 3d Cir. Certiorari denied. Reported below: 487 F. 2d 317.

No. 73–417. Hakim *v.* Superior Court of California, County of Los Angeles (Twentieth Century Fox Film Corp., real party in interest). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–418. Hutul *v.* Chicago Bar Assn. Sup. Ct. Ill. Certiorari denied.

No. 73–419. Brigandi et al. *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 73–423. Penn Central Transportation Co. *v.* Edsall. C. A. 6th Cir. Certiorari denied. Reported below: 479 F. 2d 33.

No. 73–424. Russell *v.* Continental Illinois National Bank & Trust Company of Chicago. C. A. 7th Cir. Certiorari denied. Reported below: 479 F. 2d 131.

No. 73–429. White *v.* Harrington Manufacturing Co., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 475 F. 2d 788.

No. 73–5114. Trusdell *v.* Aluli et al. Sup. Ct. Hawaii. Certiorari denied. Reported below: 54 Haw. 417, 508 P. 2d 1217.

No. 73–5152. Scandrett *v.* Turner, Warden. C. A. 10th Cir. Certiorari denied.

No. 73–5181. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5232. THOMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 9 Ill. App. 3d 1080, 293 N. E. 2d 698.

No. 73–5251. BRYDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–5299. ENGLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 1266.

No. 73–5315. NEWLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5322. BAMBERGER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 166.

No. 73–5323. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 1008.

No. 73–5325. ELEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 617.

No. 73–5342. MAYS *v.* WARNER, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 2d 1400.

No. 73–5346. MABERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5349. RUSSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 923.

No. 73–5355. ELLSWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 481 F. 2d 864.

No. 73–5368. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 2d 1400.

No. 73–5369. BITTORIE, ADMINISTRATRIX *v.* POTOMAC EDISON CO. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 2d 1400.

No. 73–5371. NIEMSZYK *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 303 A. 2d 105.

No. 73–5385. KACZYNSKI *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 73–5386. WOODELL *v.* PLOWFIELD, SHERIFF. C. A. 3d Cir. Certiorari denied.

No. 73–5387. FLETCHER *v.* SHULTZ, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5389. COLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 73–5401. SMALL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 73–5408. DOCKERY ET AL. *v.* BOYLE. C. A. 7th Cir. Certiorari denied.

No. 73–5410. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 93.

No. 73–5418. SCHRADER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 477 F. 2d 600.

No. 73–5421. LEWIS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 73–5425. HUMPHREY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 570, 196 S. E. 2d 516.

No. 73–5426. O'REILLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 208.

No. 73–5432. CARLTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 759.

No. 73–5436. KEARNS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5442. HULL *v.* ST. ELIZABETHS HOSPITAL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–5448. ALDRIDGE *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 73–5452. STEFFES *v.* CUPP, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–5454. ZERBO ET AL. *v.* MICHIGAN DEPARTMENT OF THE TREASURY, REVENUE DIVISION. Ct. App. Mich. Certiorari denied.

No. 73–5460. RUDMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–1680. HOUSING AUTHORITY OF NEW HAVEN ET AL. *v.* DORSEY, COMMISSIONER, DEPARTMENT OF COMMUNITY AFFAIRS OF CONNECTICUT, ET AL. Sup. Ct. Conn. Motion of Connecticut State Conference of the National Association for the Advancement of Colored People et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 164 Conn. 247, 320 A. 2d 820.

No. 72–6800. GOAD *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6883. MORRISON *v.* HAMILTON COUNTY BOARD OF EDUCATION. Sup. Ct. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 494 S. W. 2d 770.

No. 73–403. PAUL A. RICHTER & ASSOCIATES, INC., DBA BODY SHOP *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5160. MUELLER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 54 Ill. 2d 189, 295 N. E. 2d 705.

No. 73–5396. IVERSON *v.* NORTH DAKOTA. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 414.

No. 73–5407. PASCHALL *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5416. AUSTIN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 496 S. W. 2d 799.

No. 73–5435. DEJARNETTE *v.* FORD, GOVERNOR OF KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–116. ROCKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 481 F. 2d 112.

No. 73–205. FLOYD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Motion of Oklahoma Lawyers Guild for leave

to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 217.

No. 73–345. CASEY, AKA WARD *v.* UNITED STATES. C. A. 5th Cir. Motion to defer consideration and petition for writ of certiorari denied. Reported below: 480 F. 2d 151.

No. 73–394. MORGAN *v.* AUTOMOBILE MANUFACTURERS ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 481 F. 2d 122.

No. 73–402. ROSE ANN COATES TRUST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 480 F. 2d 468.

No. 73–427. BERNI ET AL. *v.* LEONARD, EXECUTIVE DIRECTRIX, NASSAU COUNTY CIVIL SERVICE COMMISSION, ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari.

No. 73–5256. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 478 F. 2d 1400.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioner was convicted of two counts of distributing heroin in violation of 21 U. S. C. § 841 (a)(1); he later pleaded guilty to a third count. After petitioner's plea on the third count, the District Court sentenced him to concurrent 15-year terms on the three counts, recommending that he be given drug addiction treatment at the Federal Youth Center at Ashland, Kentucky.

It refused, however, to sentence petitioner under the provisions of the Narcotic Addict Rehabilitation Act of 1966 (hereafter NARA), 18 U. S. C. § 4251 *et seq.* Petitioner claims that in the circumstances of this case the trial judge abused his discretion in refusing to sentence him under the NARA.

The three charges against petitioner grew out of three transactions in which he acted as a middleman, purchasing heroin from two different wholesalers for a federal agent. Petitioner received only a total of $15 from the three sales, which was used to buy heroin for his own personal use. Petitioner also retained some of the drug he had purchased for his own personal use.

The District Court refused to sentence petitioner under the NARA with the possibility of early release to the community because he had "sold" heroin, and was not just a user.[1]

Under 18 U. S. C. § 4251, individuals are generally not "eligible" for NARA sentencing if they have sold narcotics; Congress, however, created an express exception for those who sold primarily to support their own addiction. Section 4252, on which the Court of Appeals relied in affirming the District Court, provides that if a court believes an eligible offender to be an addict, it "may" place him in the custody of the Attorney General to determine whether he is an addict likely to be rehabilitated through treatment. Section 4253 provides that if a court, after this study, finds that an offender is an addict and is likely to be rehabilitated, it "shall" sentence him under the NARA, with exceptions not here relevant.

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[1] Pet. for Cert. 11; Memorandum for United States in Opposition 3 n. 1. Similarly, the Solicitor General argues that discretion was properly exercised because petitioner was an "active conduit" of drugs who knew many drug wholesalers. *Id.*, at 3.

An individual sentenced under the NARA could be released after six months upon a report from the Attorney General and certification from the Surgeon General that he has made sufficient progress to warrant his release under supervision; he can also be held up to 10 years if such progress is not made. 18 U. S. C. §§ 4254, 4253. After release, § 4255 provides for a program of aftercare in the community. This aftercare, consisting of psychiatric, medical, and vocational support, was considered the crucial contribution of the NARA to drug-addiction treatment.[2] It is recognized that without such ongoing aftercare, the overwhelming majority of addicts return to their habits shortly after release from prison or voluntary drug-addiction programs.[3]

Section 4252 undoubtedly preserves the discretion of the sentencing judge to refuse to apply the provisions

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[2] H. R. Rep. No. 1486, 89th Cong., 2d Sess., 12–13, 14; Hearings on the Narcotic [Addict] Rehabilitation Act of 1966 before a Special Subcommittee of the Senate Judiciary Committee, 89th Cong., 2d Sess., 19 (1966) (statement of Attorney General Katzenbach).

[3] "Under our present laws we confront the addict almost solely as a criminal, and though we can effectively remove a relatively few addicts from the streets where they are public menaces, we can do very little to prevent them from returning to society with the cause of their addiction unsolved.

. . . . . .

"Physiologically, even a long-term heroin addict can be cured of his physical craving in a relatively short time. His body no longer requires the drug. But obviously, his underlying emotional problems and the more immediate factors like environment and unemployment are as pressing as they ever were.

. . . . . .

"Clearly, neither voluntary commitment nor criminal imprisonment are working. Civil commitment of addicts accompanied by a program of aftercare in the community gives us a way out of the dilemma." *Id.*, at 16–17 (statement of Attorney General Katzenbach); see *id.*, at 36 (statements of Attorney General Katzenbach and Myrl Alexander, Director, Federal Bureau of Prisons).

of the NARA even to addicts who are "eligible" under § 4251; the provisions of the NARA are available as an alternative and are not mandatory. See H. R. Rep. No. 1486, 89th Cong., 2d Sess., 8–9, 13.

Nonetheless, it seems that Congress contemplated a more enlightened and less rigid approach to narcotics than was employed by the trial judge in the instant case.

The NARA was the product of extended consideration by the Departments of Justice, Treasury, and Health, Education, and Welfare, which stressed the necessity for flexibility in dealing with the problem of drug addiction:

> "These procedures mark a fundamental reorientation toward the problem of addiction. The Attorney General in his testimony before the subcommittee stated that for too long the law had stressed punitive solutions and neglected medical and rehabilitative measures. . . .
>
> . . . . .
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> ". . . [T]he bill provides alternatives which provide a needed flexibility in the law. The practical effect of the implementation of the law provided for in the bill, is that strict punishment can be meted out where required to the hardened criminal, while justice can be tempered with judgment and fairness in those cases where it is to the best interest of society and the individual that such a course be followed.
>
> ". . . The testimony presented at the hearings has clearly shown the need for the flexible approaches provided by civil commitment and postconviction commitment which would be made possible by this legislation." *Id.*, at 8–9.

Congress recognized that institutional treatment such as petitioner might receive in this case was ineffective,

without more, in curing drug addiction, and that individuals will generally return to addiction when released from prison even if their physiological habits have been broken. It also explicitly acknowledged that addicts, like petitioner, will engage in criminal activity to support their habits and that they will often spread addiction to others. *Id.*, at 11; S. Rep. No. 1667, 89th Cong., 2d Sess., 13. Weighing these considerations, Congress determined that even those who sold drugs, if they did so primarily to support their own habits, should be eligible for NARA consideration. The exception for addicts who sold to support their own habits was not created casually or without consideration. Civil Commitment and Treatment of Narcotic Addicts, Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 1st and 2d Sess., ser. 10, pp. 84–85 (statement of Attorney General Katzenbach). It was felt that the exception did not endanger public safety or allow the NARA to be abused. See Hearings on the Narcotic [Addict] Rehabilitation Act of 1966 before a Special Subcommittee of the Senate Judiciary Committee, 89th Cong., 2d Sess., 18 (1966) (statement of Attorney General Katzenbach).

The District Court Judge in this case effectively wrote this congressional determination out of the NARA, since he apparently refused to extend the benefits of the Act to petitioner because petitioner had "sold" drugs. This was the ineffective and inflexible treatment into which judges were forced before the passage of the NARA and which Congress attempted to cure; it does not seem consonant with the congressional purpose to continue such simplistic treatment of the problem of addiction after the NARA is available. I would grant certiorari, vacate the judgment below, and remand the case for fuller consideration of the advisability of treatment under the NARA.

No. 73–5370. FITZPATRICK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 499, 300 N. E. 2d 139.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Petitioner Martin Fitzpatrick was convicted for the first-degree murder of two police officers in Sherrill, New York. The police followed reliable leads and located a house owned by Fitzpatrick in Syracuse. After attempting to get a response from inside, the police entered the house through a door which had been left ajar. As they came to a room on the second floor, petitioner called out from a closet in which he was hiding: "Don't shoot. I give up." The officers seized and handcuffed him, and took him out into the hall. The police then questioned Fitzpatrick about the gun he had used, after advising him of his rights. He stated that it was in the closet where he had been found. The gun was retrieved from the closet and it was subsequently identified as the murder weapon at trial.

At a suppression hearing, the trial judge determined that petitioner had not been sufficiently apprised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and ruled his oral statements to the police inadmissible. The trial court nevertheless admitted the gun into evidence, rejecting petitioner's contention that it be excluded as fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The trial court adopted what has been termed the rule of "inevitable discovery," stating "proper police investigation would [in any event] have resulted in a search of that closet and [the gun's] discovery." The New York Court of Appeals affirmed, holding that the search was not inconsistent with *Chimel* v. *California*, 395 U. S. 752 (1969), and also adopted the inevitable-discovery rule.

Chimel held that a warrantless search of premises incident to arrest was justified when limited to "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*, at 763. This limitation lends substance to petitioner's claim that this search of a closet in a room while an arrestee is handcuffed in a hall in the presence of police cannot be justified. At the very least, a substantial issue of compliance with *Chimel* is posed and is deserving of this Court's attention.

Of equal importance is the adoption by the New York Court of Appeals of the inevitable-discovery rule. The rejection of that rule by the Second Circuit, *United States* v. *Paroutian*, 299 F. 2d 486 (1962), where evidence was discovered as the "fruit" of an illegal search, may pose a dilemma for law enforcement officials in the State of New York. Moreover, if the fruits doctrine applies to exclude evidence obtained as a result of statements made after improper *Miranda* warnings, compare *Miranda, supra*, at 476–477, with *Harris* v. *New York*, 401 U. S. 222 (1971), it is a significant constitutional question whether the "independent source" exception to inadmissibility of fruits, *Wong Sun, supra*, at 487–488, encompasses a hypothetical as well as an actual independent source.

Because in important respects the decision is arguably at odds with decisions of this Court, I would grant the petition for certiorari.

Rehearing Denied

No. 72-6213. HUNTER *v.* GENERAL MOTORS CORP. ET AL., 411 U. S. 973. Motion for leave to file petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 72–1564. BERNABEI *v.* UNITED STATES, *ante*, p. 825;

No. 72–1670. TEXAD, INC. (TEXAD SPECIALTY CO.) *v.* PARISH OF ST. MARY SALES AND USE TAX DEPT., *ante*, p. 803;

No. 72–1712. IN RE HOROWITZ, *ante*, p. 867;

No. 72–6745. ARNOLD *v.* KIRBY ET AL., *ante*, p. 872;

No. 72–6757. DUN LEAVAY *v.* HALLAHAN ET AL., *ante*, p. 805;

No. 72–6762. SMILGUS *v.* BERGMAN ET AL., *ante*, p. 842;

No. 72–6942. DUN LEAVAY *v.* LUTZ APPELLATE PRINTERS, INC., *ante*, p. 850;

No. 72–6969. MENDES *v.* REA EXPRESS, INC., *ante*, p. 852;

No. 72–6973. SOOTS ET UX. *v.* CONNER, *ante*, p. 852;

No. 73–229. SAFIR *v.* BLACKWELL, ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS, ET AL., *ante*, p. 975;

No. 73–5058. BEASLEY *v.* UNITED STATES, *ante*, p. 924;

No. 73–5119. FARMER ET VIR *v.* TOLEDO EDISON CO., *ante*, p. 876; and

No. 73–5175. TUBERVILLE *v.* TEXACO INC. ET AL., *ante*, p. 925. Petitions for rehearing denied.

No. 72–1448. HOWELL *v.* JONES, SHERIFF, *ante*, p. 803. Petition for rehearing and other relief denied.

NOVEMBER 21, 1973

Miscellaneous Order

No. A–435. LIFE OF THE LAND ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Motions of the State of Hawaii and of Kalihi-Palama

Community Council et al. to vacate stay and injunction entered by MR. JUSTICE DOUGLAS on November 7, 1973, granted. Reported below: 485 F. 2d 460.

MR. JUSTICE DOUGLAS, dissenting.

This case involves the sufficiency and objectivity of an Environmental Impact Statement (EIS) prepared in connection with the construction of the Reef Runway Project at Honolulu International Airport. The project is a 12,000-foot runway to be built offshore on filled reef-land in the Keehi Lagoon. The construction will involve the dredging of some 14 million cubic yards of coral and silt, consuming over 1,200 acres of ocean coral reef. The EIS, required by the National Environmental Policy Act of 1969,[1] was prepared in this case as a "joint project" by the Federal Aviation Agency, the State of Hawaii, and the Ralph M. Parsons Company.[2] The problem, as the Court of Appeals noted, is that Parsons is a private firm under contract to render management consulting services for the project in the event it is approved and thus has a strong "financial interest in an affirmative decision on the proposed project." 485 F. 2d 460, 467 (CA9 1973). The court, however, found nothing "in either the wording of NEPA or the case law which indicates that, as a matter of law, a firm with a financial interest in the project may not assist with the drafting of the EIS." *Ibid.*

It seems to me a total frustration of the entire purpose of NEPA to entrust evaluation of the environmental factors to a firm with a multimillion-dollar stake in the

[1] 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*

[2] As the court below notes: "[A]n employee of Parsons testified as to the active involvement of the Federal Aviation Agency in the EIS preparation process. The Parsons employee concluded that the EIS 'was more or less a joint effort by Parsons, the State and the F. A. A.'" 485 F. 2d 460, 467 (CA9 1973).

approval of this project. NEPA embodies the belated national recognition that we have been "brought to the brink" by myopic pursuit of technological progress and by a decisionmaking mechanism resting largely on the advice of vested-interest groups.[3] A longstanding policy of listening only to those with enough money to be heard has left our country scarred with a continuum of environmental abscesses. The oil-auto-concrete interests have long urged the necessity of paving over the countryside with highways. The same oil interests which argued the advisability of offshore drilling at Santa Barbara pressed for a trans-Alaska pipeline and obtained a concession in the Trans-Alaska Pipeline Authorization Act that in effect exempted the pipeline from NEPA to the extent that it curtailed judicial review.[4] Other inter-

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[3] "There may be controversy over how close to the brink we stand, but there is none that we are in serious trouble." H. R. Rep. No. 91–378, p. 4 (1969).

"By land, sea, and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all these enemies is man's own undirected technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, the pesticides in the food chains, and the destruction of topsoil by strip mining are examples of the failure to foresee and control the untoward consequences of modern technology." N. Y. Times, May 3, 1969, p. 34, col. 2, quoted in H. R. Rep. No. 91–378, *supra*, at 3.

[4] Section 203 (d) of the Act, 87 Stat. 585, 43 U. S. C. § 1652 (d) (1970 ed., Supp. III), provides in part:

"The actions taken pursuant to this title which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial

ests, notably those waiting for the great "killing" in nuclear fission, got temporary relief from NEPA.[5] Our congested land and fouled air bear grim testimony to the success of Detroit in making fortunes out of the destruction of elemental parts of our biosphere.

We have listened as the manufacturing-industrial complex advised us on the desirability of fueling "progress" by stripping our land and using our rivers, lakes, and atmosphere as technological sewers. We have allowed commercial recreational interests to determine the advisability of "developing" our dwindling wilderness.[6] NEPA was designed to correct in part the infor-

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review under any law except that claims alleging the invalidity of this section may be brought within sixty days following its enactment, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified."

[5] Volume 86 Stat. 191, 42 U. S. C. § 2242 (1970 ed., Supp. II), an amendment of the Atomic Energy Act of 1954, grants the Atomic Energy Commission the authority to issue temporary operating licenses for nuclear power reactors and provides that, under certain conditions, reactor operation may begin before environmental impact studies pertinent to full-term operation have been completed. See The AEC Amendment: Temporary Licensing of Nuclear Reactors, 10 Harv. J. Legis. 236 (1973).

The recent Pugwash Conference held in Finland August 30-September 4, 1973, which included 100 scientists (20 each from the United States and USSR), reported as follows on nuclear energy:

"The as yet unsolved problem of waste management and the possibly unsolvable (in an absolute sense) problems of catastrophic releases of radioactivity and diversion of bomb-grade material, combine to create grave and justified misgivings about the vast increase in the use of nuclear power that has been widely predicted. The wisdom of such an increase must at the present time be seriously questioned." 17 Cong. Rec. S18727 (Oct. 8, 1973).

[6] See, *e. g.*, the extensive skiing development of the Mineral King Valley in Sequoia National Forest. *Sierra Club* v. *Morton*, 405 U. S. 727 (1972).

mation void underlying our national decisionmaking mechanism. Congress knew what happens when we heed the counsel only of those who measure national advancement by GNP and the Dow Jones industrial average. Congress knew that we can trust them to supply us with voluminous economic data, but it also knew that we cannot trust them to supply us with an improved quality of life. They are not advocates of the interests of mountains, forests, streams, rivers, oceans, and coral beds, or of the wildlife that inhabit them, or the people who enjoy them. They are not useful when it comes to appraising the values of an unspoiled meadow or glacier or reef, for they think only in terms of dollars. They lack the sensitivity to be entrusted with evaluating what effect dredging will have on our estuaries. These estuaries are essential in part of the life cycle of two-thirds of the marine life. Dredging makes these estuaries biological deserts for years to come. Congress knew that the final say on these environmental matters should not be under the direct or indirect control of those who plan to make millions out of their destruction.

The people have long heard and too long heeded the advice of those with a monetary stake. NEPA was designed to augment that information with an analysis of other factors. Whether that analysis can be undertaken by those whose economic voice is already heard is an issue as yet undecided in this Court.[7] It is an issue worthy of our determination and should be decided before the ongoing construction of the Reef Runway does irreparable injury to the environmental interests here

[7] Congress noted in enacting NEPA that "[a]n *independent* review of the interrelated problems associated with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation." H. R. Rep. No. 91-378, p. 3 (1969) (emphasis added).

involved. These are the considerations that led me to grant the stay. I would maintain the status quo until the termination of this litigation.

NOVEMBER 26, 1973

Dismissal Under Rule 60

No. 72–1275. VICENTI *v.* UNITED STATES. C. A. 10th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 470 F. 2d 845.

NOVEMBER 28, 1973

Dismissal Under Rule 60

No. 73–5588. ADAMS *v.* NEBRASKA. Sup. Ct. Neb. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

NOVEMBER 29, 1973

Dismissal Under Rule 60

No. 73–5398. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

NOVEMBER 30, 1973

Dismissal Under Rule 60

No. 73–828. FILTROL CORP. *v.* UNION CARBIDE CORP. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

DECEMBER 3, 1973

Affirmed on Appeal

No. 73–483. STURGIS ET AL. *v.* WASHINGTON ET AL. Appeal from D. C. W. D. Wash. Motion to dispense

with printing jurisdictional statement granted. Judgment affirmed. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 368 F. Supp. 38.

No. 73–498. BURGER ET AL. *v.* JUDGE, GOVERNOR OF MONTANA, ET AL. Affirmed on appeal from D. C. Mont. Reported below: 364 F. Supp. 504.

No. 73–534. HUMAN RIGHTS PARTY OF WASHTENAW COUNTY ET AL. *v.* SECRETARY OF STATE OF MICHIGAN ET AL. Affirmed on appeal from D. C. E. D. Mich. Reported below: 370 F. Supp. 921.

No. 73–545. SPATT *v.* NEW YORK ET AL. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 361 F. Supp. 1048.

No. 73–5467. LEGION ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. S. D. N. Y. Motions of Congress of Racial Equality for leave to file a brief as *amicus curiae* and to dispense with printing denied. Motions of Black Psychiatrists of America, Inc., for leave to file a brief as *amicus curiae* and to dispense with printing denied. Motion to defer consideration denied. Judgment affirmed. MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 354 F. Supp. 456.

No. 73–5539. CLINTON *v.* MUNICIPAL COURT OF GIRARD ET AL. Appeal from D. C. N. D. Ohio. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Judgment affirmed.

Appeals Dismissed

No. 73–110. ZUKOWSKI *v.* STATE BAR GRIEVANCE BOARD OF MICHIGAN. Appeal from C. A. 6th Cir. dis-

missed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–165. BOTENS ET AL. *v.* ARONAUER ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 32 N. Y. 2d 243, 298 N. E. 2d 73.

No. 73–453. MANNING *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL. Appeal from D. C. N. D. Ohio dismissed for want of substantial federal question.

No. 73–5481. SAYLES *v.* MCGUIRE, U. S. DISTRICT JUDGE. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 72–5437. BENNETT *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further proceedings not inconsistent with the opinion of this Court in *Department of Game of Washington* v. *Puyallup Tribe*, *ante*, p. 44. Reported below: 80 Wash. 2d 561, 497 P. 2d 171.

Certiorari Granted—Reversed and Remanded. (See No. 73–241, *ante*, p. 113.)

Miscellaneous Orders

No. A–412. STARKEY *v.* MISSOURI. Sup. Ct. Mo. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–493. TERRANOVA *v.* NEW JERSEY STATE PRISON, RAHWAY, ET AL. C. A. 3d Cir. Application for bail presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–500 (73–862). LIMONE *v.* UNITED STATES. C. A. 1st Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–437 (73–5696). KREAGER *v.* GENERAL ELECTRIC CO. ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 72–700. HERNANDEZ ET AL. *v.* VETERANS' ADMINISTRATION ET AL. C. A. 9th Cir. [Certiorari granted, 411 U. S. 981.] Motion to permit two counsel to argue on behalf of petitioners granted. Motion of petitioners to permit Jack R. Petranker, Esquire, of San Francisco, California, to argue *pro hac vice* granted.

No. 72–1371. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE *v.* "AMERICANS UNITED" INC. C. A. D. C. Cir. [Certiorari granted, *sub nom. Walters* v. *"Americans United" Inc.*, 412 U. S. 927.] Motion of National Jewish Commission on Law & Public Affairs for leave to file an untimely brief as *amicus curiae* denied.

No. 72–1628. TELEPROMPTER CORP. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.; and

No. 72–1633. COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* TELEPROMPTER CORP. ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motion of Columbia Broadcasting System, Inc., et al., for divided argument granted. Motion of American Society of Composers, Authors & Publishers for leave to file a brief as *amicus curiae* in No. 72–1633 granted.

No. 72–5830. PATTERSON *v.* WARNER ET AL. Appeal from D. C. S. D. W. Va. [Probable jurisdiction noted, 411 U. S. 905.] Consideration of appellant's suggestion of mootness postponed to hearing of case on the merits.

No. 73–492. KUNSTSAMMLUNGEN ZU WEIMAR *v.* FEDERAL REPUBLIC OF GERMANY ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–5508. BEGUN *v.* WARDEN, MCNEIL ISLAND PENITENTIARY, ET AL.;

No. 73–5564. LODDY *v.* WYOMING;

No. 73–5582. BOWLING *v.* COX, WARDEN;

No. 73–5627. MORTON *v.* WYOMING;

No. 73–5630. FOXWORTH *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL.;

No. 73–5633. AMMONS *v.* UNITED STATES;

No. 73–5645. HOWARD *v.* NEVADA ET AL.;

No. 73–5656. OAKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 73–5668. DORROUGH *v.* HENDERSON, WARDEN; and

No. 73–5674. MORRIS *v.* SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–6994. OAKS *v.* SUPREME COURT OF FLORIDA ET AL.;

No. 73–5106. NEELEY *v.* HAYNSWORTH, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.; and

No. 73–5473. DELESPINE *v.* BATES, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 73–508. PFOTZER ET AL., DBA E. & E. J. PFOTZER *v.* NEWMAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 72–6609. JIMENEZ ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from D. C. N. D. Ill. Motion to dispense with printing

amicus curiae brief of Jacqueline Severance et al. granted. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 353 F. Supp. 1356.

Certiorari Granted

No. 72–1603. CARDWELL, WARDEN *v.* LEWIS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 476 F. 2d 467.

No. 73–477. GERSTEIN *v.* PUGH ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 483 F. 2d 778.

No. 73–482. MICHIGAN *v.* TUCKER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 480 F. 2d 927.

No. 73–370. NATIONAL LABOR RELATIONS BOARD *v.* FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO. C. A. D. C. Cir. Certiorari granted. Motion of Heck's Inc., for leave to intervene denied. Reported below: 155 U. S. App. D. C. 101, 476 F. 2d 546.

No. 73–439. LEHMAN BROTHERS *v.* SCHEIN ET AL.;
No. 73–440. SIMON *v.* SCHEIN ET AL.; and
No. 73–495. INVESTORS DIVERSIFIED SERVICES, INC., ET AL. *v.* SCHEIN ET AL. C. A. 2d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument limited to the following question: "Did the Court of Appeals for the Second Circuit err in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure? Fla. Stat. Ann. § 25.032 (1961), Fla. App. Rule 4.61 (1967)." Reported below: 478 F. 2d 817.

No. 73–466. WILLIAM E. ARNOLD CO. *v.* CARPENTERS DISTRICT COUNCIL OF JACKSONVILLE AND VICINITY ET AL. Sup. Ct. Fla. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 279 So. 2d 300.

No. 73–473. TAYLOR *v.* HAYES, JUDGE. Ct. App. Ky. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition which read as follows:

"1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

"2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

"3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?"

Reported below: 494 S. W. 2d 737.

No. 73–5615. CODISPOTI ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

1. "Should petitioners receive cumulative sentences for contempt of court imposed at the end of a trial where the total effective sentence received must be used rather

than the individual sentences in order to determine the seriousness of the contempt and thereby determine whether the accused should be afforded the right to a jury trial?"

2. "Should the strong possibility of a substantial term of imprisonment require that an accused be afforded the right to a jury trial?"

Reported below: 453 Pa. 619, 306 A. 2d 294.

Certiorari Denied. (See also No. 73–110, *supra.*)

No. 72–6976. WEAVER *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1135.

No. 73–50. SEDA *v.* BARBOSA ET AL. Super. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 73–164. KANAREK *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–220. PEREZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 277 So. 2d 778.

No. 73–242. THAGGARD *v.* UNITED STATES; and

No. 73–255. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 626.

No. 73–376. Coco *v.* UNITED STATES; and

No. 73–449. NAKALADSKI, AKA NASH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 289.

No. 73–392. DALY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 481 F. 2d 28.

No. 73–396. REED ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 2d 634.

No. 73–398. EMALFARB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 787.

No. 73–407. LAUCHLI *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1405.

No. 73–411. BERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 896.

No. 73–414. ANGGELIS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–441. HURD-DARBEE, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 926.

No. 73–443. LOCAL UNION No. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 477 F. 2d 260.

No. 73–444. ANDRESEN *v.* BAR ASSOCIATION OF MONTGOMERY COUNTY. Ct. App. Md. Certiorari denied. Reported below: 269 Md. 313, 305 A. 2d 845.

No. 73–445. HAMILTON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 63 N. J. 324, 307 A. 2d 97.

No. 73–446. SLEGERS-FORBES, INC., ET AL. *v.* NEW JERSEY HIGHWAY AUTHORITY ET AL. Super. Ct. N. J. Certiorari denied. Reported below: 123 N. J. Super. 291, 302 A. 2d 545.

No. 73–447. CUTLER *v.* UNITES STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 221.

No. 73–448. SLACK, AKA BUDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–450. GROTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–451. WHISTENANT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 50 Ala. App. 182, 278 So. 2d 183.

No. 73–452. CITY OF TOPEKA STREET DEPARTMENT *v.* KANSAS COMMISSION ON CIVIL RIGHTS. Sup. Ct. Kan. Certiorari denied. Reported below: 212 Kan. 398, 511 P. 2d 253.

No. 73–455. SEE *v.* LOCAL UNION 417, UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–456. MARTINEZ-MARTINEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 117.

No. 73–460. TROISE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 615.

No. 73–462. WEIR *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 501, 474 F. 2d 617.

No. 73–465. TITUS *v.* KORNFIELD, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied.

No. 73–468. MILLIMAN *v.* FRIEDRICH ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–469. SIGNER *v.* TRUSTEES OF PROPERTY OF PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied.

No. 73–472. WOODMAN ET AL. *v.* AMASON ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 498 S. W. 2d 142.

No. 73–474. SMITH *v.* ROBINSON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–475. SPILOTRO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1406.

No. 73–476. GROSS *v.* MEDICAL MUTUAL OF CLEVELAND, INC. C. A. 6th Cir. Certiorari denied.

No. 73–479. GEORGE BENZ & SONS *v.* BUTZ, SECRETARY OF AGRICULTURE. C. A. 8th Cir. Certiorari denied.

No. 73–481. HOUSTON NATURAL GAS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 467.

No. 73–485. KOVATS *v.* FIRST NATIONAL BANK OF BROKEN ARROW. C. A. 10th Cir. Certiorari denied.

No. 73–486. VIRGIN ISLAND HOTEL ASSN. (U. S.), INC. *v.* VIRGIN ISLANDS WATER & POWER AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 476 F. 2d 1263.

No. 73–490. VAN DE WALLE *v.* AMERICAN CYANAMID CO. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 20.

No. 73–493. SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL–CIO, ET AL. *v.* PIGNOTTI. C. A. 8th Cir. Certiorari denied. Reported below: 477 F. 2d 825.

No. 73–497. CANNON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 260 S. C. 537, 197 S. E. 2d 678.

No. 73–502. STRUMSKIS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 668, 474 F. 2d 623.

No. 73–503. RAMSEY ET AL. *v.* UNITED MINE WORKERS OF AMERICA. C. A. 6th Cir. Certiorari denied. Reported below: 481 F. 2d 742.

No. 73–509. KING *v.* BAER, TRUSTEE. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 552.

No. 73–510. WYANDOTTE COUNTY, KANSAS, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 969.

No. 73–511. INDIANA & MICHIGAN ELECTRIC CO. *v.* ANDERSON POWER & LIGHT OF CITY OF ANDERSON, INDIANA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 156 U. S. App. D. C. 315, 481 F. 2d 490.

No. 73–514. PRINCE GEORGES COUNTY *v.* MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION. Ct. App. Md. Certiorari denied. Reported below: 269 Md. 202, 306 A. 2d 223.

No. 73–515. GREEN, ADMINISTRATRIX *v.* ROSS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 102.

No. 73–520. TAYLOR *v.* R. H. MACY & CO., INC. C. A. 9th Cir. Certiorari denied.

No. 73–522. GIBSON & PERIN CO. ET AL. *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 936.

No. 73–523. ALEXANDER *v.* ALTON OCHSNER MEDICAL FOUNDATION ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 276 So. 2d 794.

No. 73–526. ALASKA HELICOPTERS, INC., ET AL. *v.* ANDERSON ET AL. Super. Ct. Alaska, 3d Jud. Dist. Certiorari denied.

No. 73–530. CHERUP ET AL. *v.* PITTSBURGH PLATE GLASS CO. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–540. STATHAM *v.* RIDDLE. C. A. 9th Cir. Certiorari denied. Reported below: 483 F. 2d 436.

No. 73–548. HAHN ET UX. *v.* ROBINSON MEMORIAL HOSPITAL. Sup. Ct. Ohio. Certiorari denied.

No. 73–551. SMITH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 278 So. 2d 454.

No. 73–553. NEGAARD ET AL. *v.* DEPARTMENT OF AERONAUTICS OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 32 Cal. App. 3d 92, 107 Cal. Rptr. 920.

No. 73–554. PHILIPPINE ACE LINES *v.* SEATTLE STEVEDORE CO. C. A. 9th Cir. Certiorari denied.

No. 73–555. LINDSAY, MAYOR OF NEW YORK, ET AL. *v.* MAYE ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 552, 301 N. E. 2d 425.

No. 73–559. HECK'S INC. *v.* FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO. C. A. D. C. Cir. Certiorari denied. Reported below: 155 U. S. App. D. C. 101, 476 F. 2d 546.

No. 73–5063. BOYD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 492 S. W. 2d 787.

No. 73–5151. WATSON *v.* AULT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–5169. MCCRAY *v.* SCHLITZ, CLERK, U. S. DISTRICT COURT. C. A. 4th Cir. Certiorari denied.

No. 73–5203. ROSS *v.* BLACKLEDGE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5278. MASELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5288. D'ORSAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1403.

No. 73–5316. DEMPSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5321. GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 482 F. 2d 807.

No. 73–5324. WILLIAMS *v.* UNITED STATES; and
No. 73–5341. SWANSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 484 F. 2d 176.

No. 73–5327. MINOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5345. JULIAN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 405.

No. 73–5364. LOONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 31.

No. 73–5377. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 360.

No. 73–5383. SALCIDO-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 483 F. 2d 162.

No. 73–5390. WURZINGER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–5393. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 734.

No. 73–5405. STOCKMAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 954.

No. 73–5406. ZITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5411. DITOMMASO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5417. RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5422. DOTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 1005.

No. 73–5428. SNOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5433. GREEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 483 F. 2d 469.

No. 73–5440. HINES *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5441. THIBADOUX *v.* WARDEN, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 73–5445. KIMMEL *v.* WYOMING ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 73–5453. NATIONS *v.* MORRIS ET AL.; and

No. 73–5458. KIRKLAND *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: No. 73–5453, 483 F. 2d 577; No. 73–5458, 483 F. 2d 590.

No. 73–5461. POLESE *v.* BREMER ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5463. MCNEARY *v.* STONE, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 804.

No. 73–5466. GERARD *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 511 P. 2d 99.

No. 73–5468. COOPER *v.* TEXAS BOARD OF MEDICAL EXAMINERS. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 489 S. W. 2d 129.

No. 73–5471. LASHLEY *v.* FORD MOTOR CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 158.

No. 73–5474. PALLER *v.* PALLER. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 73–5477. RING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5488. AVINA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 73–5491. HANDVERGER ET AL. *v.* HARVILL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 479 F. 2d 513.

No. 73–5492. CARTER *v.* HILL, ATTORNEY GENERAL OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 922.

No. 73–5493. KOVAC *v.* MEACHAM, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 73–5495. ALEXANDER *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 73–5496. PARSON *v.* ANDERSON, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 481 F. 2d 94.

No. 73–5501. JONES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5504. SCOTT, AKA DAVIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 495 S. W. 2d 800.

No. 73–5505. PFEIFER *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–5506. CORCELLER *v.* BONANZA INTERNATIONAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 613.

No. 73–5509. SCOTT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 497 S. W. 2d 561.

No. 73–5513. FRIST *v.* HAYNSWORTH, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1341.

No. 73–5518. EDWARDS *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5521. HAMPTON *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–5522. DAVIS *v.* CROWELL CONSTRUCTION CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–5523. WEST *v.* HUNT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–5528. LOWRY *v.* ENOMOTO, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–5533. HARDEN *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5544. PAPPAS *v.* JWJ WHOLESALE DISTRIBUTORS, INC. Ct. App. Tenn. Certiorari denied.

No. 73–5553. ARMATO *v.* CORRECTIONAL SUPERINTENDENT, EASTERN N. Y. CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 41 App. Div. 2d 1029, 343 N. Y. S. 2d 798.

No. 73–5554. SHORTER *v.* ALLEN SUPERIOR COURT ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. —, 292 N. E. 2d 286.

No. 73–5555. GEDVICK *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS AFFILIATED ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–5562. BROWN *v.* BALDWIN, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied.

No. 73–5563. MCDONALD *v.* WELLONS ET AL. Ct. App. Tenn. Certiorari denied.

No. 73–5565. PARKS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 453 Pa. 296, 309 A. 2d 725.

No. 73–5574. HARDWICK *v.* GEORGIA. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–5576. CASPERSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 73–5583. DEAR *v.* LOCKE ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–5589. ROSS *v.* MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5596. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 73–5597. SERRANO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 623, 301 N. E. 2d 549.

No. 73–5625. FREED ET AL. *v.* MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION. Ct. App. Mich. Certiorari denied.

No. 72–1399. COAR *v.* GROSS. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 62 N. J. 197, 299 A. 2d 731.

No. 72–6971. ORTIZ *v.* FRITZ, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 37.

No. 73–162. EDGECOMBE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 275 So. 2d 740.

No. 73–225. HALLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 453.

No. 73–413. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 848.

No. 73–422. D'AMBRA ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 14.

No. 73–458. RAGUSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–470. HETRICK *v.* MARTIN ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 705.

No. 73–471. REID ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL UNION 1093. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 517.

No. 73–484. BOYLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 157 U. S. App. D. C. 166, 482 F. 2d 755.

No. 73–496. UNARCO INDUSTRIES, INC. *v.* SWANSON ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 664.

No. 73–506. DIAMOND CAB COMPANY OF SAN DIEGO COUNTY, INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5205. SMITH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 452 Pa. 1, 304 A. 2d 456.

No. 73–5331. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 454.

No. 73–5372. NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 453.

No. 73–5400. SHERIDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 169.

No. 73–5403. MERRILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 168.

No. 73–5449. SHEPHERD *v.* ROSS ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 1400.

No. 73–5502. PINELL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5517. TINSLEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 495 S. W. 2d 776.

No. 73–5519. KARALLA *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5542. PUGH ET AL. *v.* GERSTEIN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 778.

No. 72–6930. EX PARTE KENT. Sup. Ct. Mo. Certiorari denied. Reported below: 490 S. W. 2d 649.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The finality of the judgment in this case, at least with respect to the double jeopardy claim, is squarely decided by *Harris* v. *Washington*, 404 U. S. 55, 56 (1971). After being found not guilty by reason of insanity and committed, the petitioner sought habeas corpus relief in the Missouri Supreme Court, challenging the statute under which he was committed. That court found that petitioner was indeed improperly confined under the statute, since he should never have been acquitted. The judgment of acquittal was vacated and the case was remanded

with instructions that "[i]f it is determined that petitioner is mentally fit to proceed, the criminal proceedings may be resumed." On June 29, 1973, the trial court found petitioner competent and set the case for trial on October 29, 1973. Petitioner's attorney has informed the clerk's office that a continuance has been granted and trial is currently set for December 3, 1973. The essence of petitioner's double jeopardy claim, raised and rejected below on petition for rehearing, is that he may not again be tried. The decision that he may be so tried is final for purposes of 28 U. S. C. § 1257:

> "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. C. § 1257." *Harris* v. *Washington, supra,* at 56.

In *Harris* the Washington Supreme Court denied a writ of prohibition to stay a trial which petitioner claimed was barred by double jeopardy. In this case petitioner, on petition for rehearing, unsuccessfully objected to the Missouri Supreme Court's determination that criminal proceedings be resumed upon a finding of competence, and the St. Louis Circuit Court has ordered petitioner to stand trial in accordance with the Missouri Supreme Court mandate. Although his constitutional objections to the commitment statute may not be properly before us since petitioner is no longer committed under the statute, the double jeopardy claim is properly reviewable at this point since his objection to standing trial has been rejected and petitioner has been ordered to stand trial in accordance with the mandate of the State's highest court.

The issue as posed should at least be set for argument.

No. 73–44. MORRISON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 268 So. 2d 207.

No. 73–454. PHILLIPS PETROLEUM CO. *v.* ZIEGLER. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. Reported below: 486 F. 2d 858.

No. 73–461. GRABOWSKI *v.* NORTHERN FISHING & TRADING CO., INC., ET AL. C. A. 9th Cir. Motion of Association of Trial Lawyers of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 477 F. 2d 1267.

No. 73–463. BAKER ET AL., TRUSTEES *v.* MORGAN GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would grant certiorari. Reported below: 484 F. 2d 323.

No. 73–489. CLARK COUNTY, NEVADA *v.* TURNER, GUARDIAN. Sup. Ct. Nev. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests upon an adequate state ground. Reported below: —— Nev. ——, 510 P. 2d 879.

No. 73–538. SUMBRY ET AL. *v.* LAND, JUDGE. Ct. App. Ga. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 127 Ga. App. 786, 195 S. E. 2d 228.

No. 73–552. SCHWARTZ ET AL. *v.* DEFENDER ASSOCIATION OF PHILADELPHIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN,

and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 453 Pa. 353, 307 A. 2d 906.

No. 73–558. MICHIGAN *v.* MCMILLER. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 389 Mich. 425, 208 N. W. 2d 451.

No. 73–595. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 73–5273. ROSS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 296 N. E. 2d 810.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Petitioner was convicted in state court of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. Petitioner and his codefendants are young Negroes. Their victim was a white, uniformed security guard employed by Boston University. Petitioner requested the trial judge to direct a specific question concerning racial prejudice to the prospective jurors on voir dire.[1] The trial judge refused; instead, he made only the general inquiry mandated by Massachusetts law, whether members of the array had "expressed or formed an opinion, or [were] sensible of any bias or prejudice." The Supreme Judicial Court of Massachusetts affirmed the conviction. —— Mass. ——, 282 N. E. 2d 70 (1972).

[1] The specific question requested was, "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

Petitioner sought certiorari on the ground that he had been denied the opportunity to have the jurors examined as to racial bias, a right this Court guaranteed in *Aldridge* v. *United States,* 283 U. S. 308 (1931). We granted certiorari and remanded for reconsideration in light of *Ham* v. *South Carolina,* 409 U. S. 524 (1973). On remand, the Supreme Judicial Court of Massachusetts again upheld the conviction. —— Mass. ——, 296 N. E. 2d 810 (1973).

The importance of the right at issue here—the opportunity to ascertain the racial bias of the veniremen—can hardly be gainsaid. The right to trial by an "impartial jury" is a cornerstone of our system of justice.[2]

> "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville,* 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States,* 98 U. S. 145, 155." *Irvin* v. *Dowd,* 366 U. S. 717, 722 (1961) (footnote omitted).

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[2] See *Peters* v. *Kiff,* 407 U. S. 493 (1972); *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Swain* v. *Alabama,* 380 U. S. 202 (1965); *Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Dennis* v. *United States,* 341 U. S. 494 (1951); *Lewis* v. *United States,* 146 U. S. 370 (1892); *Pointer* v. *United States,* 151 U. S. 396 (1894).

Accordingly, in *Ham* v. *South Carolina, supra,* MR. JUSTICE REHNQUIST, writing for a unanimous Court,[3] found constitutional error in a state court trial judge's refusal to propound a specific question on racial prejudice to the veniremen in the trial of a Negro for possession of marihuana.[4]

> "The State having created [the] statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias." 409 U. S., at 527.

Nonetheless, on remand, the Massachusetts court read our decision in *Ham* as limited by the particular circumstances of that case—the trial of a civil rights worker in the South. The State court found that petitioner, unlike Ham, was not likely to be a "special target for racial prejudice" and, therefore, that the trial judge did not err in refusing to make the requested inquiry.

This distinction is supported by neither logic nor precedent. MR. JUSTICE REHNQUIST explained the basis for the Court's decision in *Ham* as follows:

> "The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* [v. *United States*] and the numer-

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[3] Although the Court was unanimous on this issue, the author and MR. JUSTICE DOUGLAS dissented on another ground.

[4] In *Ham,* as in the case before us, the trial judge asked only the general questions about bias provided for by statute. This Court observed that while a trial judge is not required to put the question about racial prejudice in the exact form suggested by the defendant, the question must be "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." 409 U. S., at 527. The Court found the general questions propounded by the trial court insufficient for that purpose.

ous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment." *Id.*, at 528.

In *Aldridge* v. *United States*, 283 U. S. 308 (1931), Mr. Chief Justice Hughes, writing for the Court, found that the "essential demands of fairness" required the trial judge to interrogate veniremen as to racial prejudice in the trial of a Negro for murdering a white policeman. The Court observed that "[n]o surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred." *Id.*, at 315.

The *Aldridge* Court was not concerned with whether petitioner was unpopular in the community—a special target of prejudice—but rather with the potential racial "bias of the particular jurors who are to try the accused." *Id.*, at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that "the possibility of such prejudice [against Negroes] is [not] so remote as to justify the risk in forbidding the inquiry." *Ibid.*[5] (Footnote omitted.) Nor did the Court purport to limit its holding to any region because the "question is not . . . the dominant sentiment of the community . . . ." *Ibid.*

In *Ham*, this Court reaffirmed its commitment to the holding of *Aldridge* and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice—the principal target of the Fourteenth Amendment. The Court also indi-

[5] Cf. H. Kalven & H. Zeisel, The American Jury 210, 339–344 (1966).

cated the importance of the state cases, of which the *Aldridge* Court said:

> "The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed." *Id.*, at 313.

The principle that fairness demands such inquiry is, if anything, far more pervasive today than it was when *Aldridge* was decided, in both federal and state courts.[6]

Yet, the Massachusetts court, by its holding, requires a Negro defendant to establish that he is a special target for racial prejudice before being entitled to an inquiry on racial bias during the voir dire of the jury. In *Aldridge*, this Court weighed the Government's interests in refusing such a question, where it observed that:

> "If in fact [the jurors] were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a

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[6] See *United States* v. *Carter*, 440 F. 2d 1132 (CA6 1971); *United States* v. *Gore*, 435 F. 2d 1110 (CA4 1970); *Silverthorne* v. *United States*, 400 F. 2d 627 (CA9 1968); *King* v. *United States*, 124 U. S. App. D. C. 138, 362 F. 2d 968 (1966); *Frasier* v. *United States*, 267 F. 2d 62 (CA1 1959); *Smith* v. *United States*, 262 F. 2d 50 (CA4 1958); *United States* v. *Dennis*, 183 F. 2d 201 (CA2 1950), aff'd, 341 U. S. 494 (1951); *Gholston* v. *State*, 221 Ala. 556, 130 So. 69 (1930); *State* v. *Higgs*, 143 Conn. 138, 120 A. 2d 152 (1956); *Pinder* v. *State*, 27 Fla. 370, 8 So. 837 (1891); *Herndon* v. *State*, 178 Ga. 832, 174 S. E. 597 (1934); *State* v. *Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles* v. *State*, 229 Md. 370, 183 A. 2d 359 (1962); *Owen* v. *State*, 177 Miss. 488, 171 So. 345 (1936); *State* v. *Pyle*, 343 Mo. 876, 123 S. W. 2d 166 (1938); *Johnson* v. *State*, 88 Neb. 565, 130 N. W. 282 (1911); *People* v. *Decker*, 157 N. Y. 186, 51 N. E. 1018 (1898); *State* v. *McAfee*, 64 N. C. 339 (1870); *Fendrick* v. *State*, 39 Tex. Cr. 147, 45 S. W. 589 (1898).

> prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.*, at 314.

The state court should not be permitted to restrike that balance.

Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judges what we must all know as men. That petitioner was tried in Boston, Massachusetts, while Gene Ham was tried in Florence, South Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South.[7] And where, as here and in the strikingly similar circumstances of the *Aldridge* case, a Negro is being accused of an attack on a white policeman, it would be disingenuous at best to assert that he is not apt to be a particular target of racial prejudice.

To deny this petition for certiorari is to see our decision in *Ham* v. *South Carolina* stillborn and to write an epitaph for those "essential demands of fairness" recognized by this Court 40 years ago in *Aldridge*. I fear that we "bring the processes of justice into disrepute" not only by sanctioning the denial of a right required by "essential demands of fairness" but also in failing to compel compliance by the court below with a precedent of this Court barely a year since decided. I would grant the petition.

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[7] Cf. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189 (1973) (desegregation of the Denver, Colo., school system); *Bradley* v. *Milliken*, 484 F. 2d 215 (CA6), cert. granted, *ante*, p. 1038 (desegregation of the Detroit, Mich., school system). See generally Report of the National Advisory Commission on Civil Disorders (1968).

No. 73–5503. SMITH *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 510 P. 2d 793.

No. 73–5512. NELSON *v.* JOHNSON, WARDEN. C. A. 6th Cir. Motion to defer consideration of petition and certiorari denied.

Rehearing Denied

No. 72–1531. NASH *v.* UNITED STATES, *ante*, p. 823;

No. 72–1537. KERSHAW *v.* BROOKS ET AL., *ante*, p. 824;

No. 72–1546. MOORE *v.* KENTUCKY, *ante*, p. 865;

No. 72–1618. GIMELSTOB *v.* UNITED STATES, *ante*, p. 828;

No. 72–1625. ALL ET AL. *v.* NORTH CAROLINA, *ante*, p. 866;

No. 72–1638. CRAVEN *v.* UNITED STATES, *ante*, p. 866;

No. 72–1685. OWEN *v.* OWEN, *ante*, p. 830;

No. 72–1687. MILLER *v.* UNITED STATES, *ante*, p. 830;

No. 72–1721. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* COTTLE, *ante*, p. 895;

No. 72–1736. WHITE *v.* GEORGIA, *ante*, p. 886;

No. 72–6281. MCMASTER *v.* CONNETT, WARDEN, *ante*, p. 814;

No. 72–6533. BEESON *v.* KASSOS ET AL., *ante*, p. 833;

No. 72–6589. DISBROW *v.* UNITED STATES, *ante*, p. 869;

No. 72–6596. DAPPER *v.* O'CONNOR ET AL., *ante*, p. 835;

No. 72–6822. ALERS *v.* SOTO, JUDGE, *ante*, p. 892;

No. 72–6832. LONG *v.* GAMMILL ET AL., *ante*, p. 805;

No. 72–6867. HARRELSON *v.* UNITED STATES, *ante*, p. 847; and

No. 72–6875. OLDEN *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, *ante*, p. 847. Petitions for rehearing denied.

No. 72–6879. BAILEY *v.* HOUSTON CHRONICLE PUBLISHING CO., *ante*, p. 873;

No. 73–82. CARDEN *v.* BROOKS ET AL., *ante*, p. 824;

No. 73–101. HUNTER *v.* UNITED STATES, *ante*, p. 857;

No. 73–148. SHAPIRO *v.* CITY OF NEW YORK ET AL., *ante*, p. 804;

No. 73–167. GRAFF VENDING CO. ET AL. *v.* HAMPTON, DBA HAMPTON VENDING SUPPLY, *ante*, p. 859;

No. 73–177. GOLDSTEIN, RECEIVER *v.* UNITED STATES, *ante*, p. 974;

No. 73–209. DESMARAIS ET AL. *v.* WACHUSETT REGIONAL SCHOOL DISTRICT ET AL., *ante*, p. 859;

No. 73–224. ROSE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 975; and

No. 73–5046. STOKES *v.* BRUCE ET AL., *ante*, p. 893. Petitions for rehearing denied.

No. 72–1545. BARRETT *v.* UNITED STATES, *ante*, p. 824;

No. 72–1553. MULLIGAN ET AL. *v.* UNITED STATES, *ante*, p. 825; and

No. 72–1592. BIDDY *v.* MISSISSIPPI, *ante*, p. 866. Motions to dispense with printing petitions for rehearing granted. Motions for leave to file petitions for rehearing denied.

No. 72–1574. BOB LAWRENCE REALTY, INC., ET AL. *v.* UNITED STATES, *ante*, p. 826;

No. 72–1705. CARINI *v.* ZONING BOARD OF APPEALS OF THE TOWN OF WEST HARTFORD, *ante*, p. 831;

No. 72–6549. KERR *v.* UNITED STATES, *ante*, p. 868;

No. 72–6782. HARPER *v.* TEGTMEYER, ACTING COMMISSIONER OF PATENTS, ET AL., *ante*, p. 843; and

No. 73–5158. HAWKINS *v.* MEACHAM, WARDEN, ET AL., *ante*, p. 814. Motions for leave to file petitions for rehearing denied.

No. 72–1604. HEWLETT *v.* HEWLETT, *ante*, p. 877;

No. 73–215. FALKNER ET UX. *v.* FERGUSON, JUDGE, ET AL., *ante*, p. 806; and

No. 73–216. FALKNER ET UX. *v.* FERGUSON, JUDGE, ET AL., *ante*, p. 806. Motions to dispense with printing petitions for rehearing granted. Petitions for rehearing denied.

No. 72–5082. WOCHER *v.* LOS ANGELES CITY SCHOOL DISTRICT ET AL., 409 U. S. 1042, 1131. Motion for leave to file second petition for rehearing denied.

No. 73–168. DUROVIC, DBA DUGA LABORATORIES, ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., *ante*, p. 944. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

DECEMBER 10, 1973

Affirmed on Appeal

No. 73–623. YOUNG LORDS PARTY ET AL. *v.* SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 360 F. Supp. 581.

Appeals Dismissed

No. 73–579. STATE TAX COMMISSION OF ARIZONA ET AL. *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 109 Ariz. 429, 510 P. 2d 745.

No. 73–621. UNION PACIFIC RAILROAD CO. ET AL. *v.* CITY AND COUNTY OF DENVER ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal ques-

tion. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: — Colo. —, 511 P. 2d 497.

Miscellaneous Orders

No. A–363 (73–5691). NORWOODS *v.* CALIFORNIA. Application for stay of execution of judgment and remittitur of the Court of Appeal of California, Fourth District, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–517. KAPLAN *v.* CONTINENTAL CAN CO., INC., ET AL. C. A. 3d Cir. Application for writ of mandamus and other relief presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–535. EPIFANIA *v.* UNITED STATES. C. A. 2d Cir. Application for stay of execution and enforcement of judgment of conviction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 72–1490. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.; and

No. 72–1491. DOUGHERTY, EXECUTOR, ET AL. *v.* TEXACO INC. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 817.] Motion of Independent Petroleum Association of America for leave to file a brief as *amicus curiae* granted.

No. 72–1598. NATIONAL LABOR RELATIONS BOARD *v.* BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) for leave to file a brief as *amicus curiae* granted.

No. 72–5830. PATTERSON *v.* WARNER ET AL. Appeal from D. C. S. D. W. Va. [Probable jurisdiction noted,

411 U. S. 905.] Motion of Cletus B. Hanley to permit Phillip D. Gaujot, Esquire, to present oral argument *pro hac vice* granted.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 908.] Motions of New York State Trial Lawyers Assn., NAACP Legal Defense & Educational Fund, Inc., California Trial Lawyers Assn., and Public Citizen & Consumers Union of United States, Inc., for leave to file briefs as *amici curiae* granted.

No. 73–406. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* DOE ET AL.; and

No. 73–5650. DOE ET AL. *v.* BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 73–615. PRUDHOMME *v.* AL JOHNSON CONSTRUCTION CO.-MASSMAN CONSTRUCTION CO. ET AL. C. A. 5th Cir. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before December 27, 1973. MR. JUSTICE DOUGLAS would grant the motion.

No. 73–5747. TURNER *v.* BLACK, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 73–557. JENKINS *v.* GEORGIA. Appeal from Sup. Ct. Ga. Motions of Authors League of America, Inc., National Association of Theatre Owners, and Association of American Publishers, Inc., et al. for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. Reported below: 230 Ga. 726, 199 S. E. 2d 183.

Certiorari Granted

No. 73–346. ANDERSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Reported below: 481 F. 2d 685.

No. 73–631. HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO. C. A. 6th Cir. Certiorari granted. Reported below: 482 F. 2d 489.

No. 73–5265. KOKOSZKA *v.* BELFORD, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 479 F. 2d 990.

No. 73–5284. DORSZYNSKI *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 484 F. 2d 849.

Certiorari Denied

No. 72–6580. OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL UNION LOCAL 685, AFL–CIO *v.* TEXACO INC. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 594.

No. 72–6720. TRAMMELL *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–210. FROMMHAGEN *v.* SCOTT. Ct. App. D. C. Certiorari denied.

No. 73–292. HENDRICKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–361. RICORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 1397.

No. 73–512. ALAN F. HUGHES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 401.

No. 73–517. VEST ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 238.

No. 73–533. SIGNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 394.

No. 73–524. SCHENNAULT, AKA ALVAREZ, ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1406.

No. 73–562. PATLOGAN ET AL. *v.* DICKSTEIN, SHAPIRO & GALLIGAN, NOW COLSON & SHAPIRO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 1045.

No. 73–563. LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* BOLDT ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 481 F. 2d 1392.

No. 73–564. SHALLER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 571.

No. 73–567. STEIN *v.* CITY OF NEW BERLIN. Sup. Ct. Wis. Certiorari denied. Reported below: 58 Wis. 2d 417, 206 N. W. 2d 207.

No. 73–570. SOUTHWIRE CO. ET AL. *v.* METAL EQUIPMENT CO. Ct. App. Ga. Certiorari denied. Reported below: 129 Ga. App. 49, 198 S. E. 2d 687.

No. 73–572. FARHA ET AL. *v.* UNIFIED SCHOOL DISTRICT NO. 259, WICHITA, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–580. RICHARDS *v.* CROWN POINT COMMUNITY SCHOOL CORP. ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 290 N. E. 2d 449.

No. 73–581. NEW YORK *v.* BERCK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 567, 300 N. E. 2d 411.

No. 73–588. CALIFORNIA STATE EMPLOYEES' ASSN. ET AL. *v.* FLOURNOY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 32 Cal. App. 3d 219, 32 Cal. Rptr. 251.

No. 73–589. UNION OIL COMPANY OF CALIFORNIA *v.* DUGAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 773.

No. 73–597. PARKER *v.* LOUISIANA ET AL. Sup. Ct. La. Certiorari denied. Reported below: 282 So. 2d 483.

No. 73–602. TRAVELERS INSURANCE CO. *v.* BLUE CROSS OF WESTERN PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 481 F. 2d 80.

No. 73–609. ELLS *v.* COUNTY OF WELD ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–626. MITSUI O. S. K. LINES, LTD. *v.* STRACHAN SHIPPING CO. C. A. 5th Cir. Certiorari denied. Reported below: 479 F. 2d 432.

No. 73–633. CELANESE CORP. ET AL. *v.* HEMPHILL, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied.

No. 73–634. MEYER *v.* SEAMANS, SECRETARY OF THE AIR FORCE. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1406.

No. 73–635. FOUST *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 18 N. C. App. 133, 196 S. E. 2d 374.

No. 73–642. EMPIRE CONSTRUCTION, INC. *v.* CITY OF TULSA, OKLAHOMA. Sup. Ct. Okla. Certiorari denied. Reported below: 512 P. 2d 119.

No. 73–643. BOURNS, INC., ET AL. *v.* ALLEN-BRADLEY CO. ET AL.; and

No. 73–644. ALLEN-BRADLEY CO. ET AL. *v.* BOURNS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 480 F. 2d 123.

No. 73–5047. FALCONER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1405.

No. 73–5051. GUSTAV, AKA FERRICK *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 81 Wash. 2d 942, 506 P. 2d 860.

No. 73–5204. REGALADO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–5217. DAVIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 452 Pa. 604, 303 A. 2d 823.

No. 73–5221. RICE *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5250. ROTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5257. HARRISON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5258. KISH *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 594.

No. 73–5338. CARTER ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 479 F. 2d 1084.

No. 73–5357. CORREA-NEGRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5402. OSORIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 1343.

No. 73–5415. NOAH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 688.

No. 73–5431. MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5434. SIMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 582.

No. 73–5443. SPROUSE ET AL. *v.* FEDERAL PRISON INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 1.

No. 73–5446. BUCHHOLZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 65.

No. 73–5470. ISAAC *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 502.

No. 73–5475. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5511. SCHERER *v.* NEVADA SUPREME COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–5534. LUCCHETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5594. DELEVAY *v.* DOWNS. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 907.

No. 73–5601. DICKEY *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–5602. WILSON ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 280 So. 2d 480.

No. 73–5605. COOPER *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–5606. LATHAN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 73–5614. TARLTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 73–5616. SCOTT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5617. POLAND *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5619. LAWTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5623. CROTHERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 278 So. 2d 12.

No. 73–5632. LYONS *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 73–5646. BARBARITO *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5662. GARDNER ET AL. *v.* JOYCE, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 283.

No. 73–5671. PACE *v.* GALLAGHER ET AL. C. A. 1st Cir. Certiorari denied.

No. 73–295. DOE ET AL. *v.* BRENNAN, SECRETARY OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 537.

No. 73–531. MOODY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 1327.

No. 73–625. STARR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 63 N. J. 553, 310 A. 2d 468.

No. 73–5038. GREEN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 601.

No. 73–5214. CONNER *v.* HENDERSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 922.

No. 73–5230. FARMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 119.

No. 73–5579. GULLAGE *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 1219.

No. 73–459. NEW RIDER ET AL. *v.* BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1, PAWNEE COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 693.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioners are male Pawnee Indians who are students at Pawnee Junior High School, a public school in Oklahoma. They sought to wear their hair parted in the middle with a long braid on each side so that, in their words, they could follow the "old traditional ways"

and because such a hairstyle was "one way of telling people that I am proud [to be an Indian]." Others testified that young Indians sought to wear braided hair because of a new-found pride in their heritage, in an attempt to "regain their tradition, to learn their culture."

These youths were suspended from school indefinitely on April 24, 1972,[1] for being in violation of a school hair-length regulation, which forbids hair reaching the shirt collar or ears. The Court of Appeals justified the suspension on the ground that the regulation was rational in that it sought to achieve the objective of "instilling pride and initiative among the students leading to scholarship attainment and high school spirit and morale." The court stressed testimony from one school superintendent that a school system cannot countenance different groups and still remain one organization.

Petitioners claim, *inter alia*, that the school hair-length restriction unjustifiably impinges on the freedom of expression guaranteed them by the First and Fourteenth Amendments. This Court has consistently, over my dissents, refused to review lower court decisions passing on the constitutionality of school hair-length regulations, whether such regulations have been upheld or struck down, and regardless of the grounds on which the lower courts have reached their conclusions. I have noted the deep division among the Circuits on this issue, and have thought that it is an issue of particular personal interest to many and of considerable constitutional importance. See *Freeman* v. *Flake*, 405 U. S. 1032; *Olff* v. *East Side Union High School District*, 404 U. S. 1042.

[1] The suspension was stayed by a preliminary injunction of the District Court which apparently ran from May 1, 1972, to June 5, 1972, and apparently also by a stay entered by the Court of Appeals which ran from July 6, 1973, to September 4, 1973. Respondents claim that the suspension of petitioners was not permanent, but this is contradicted by the Court of Appeals' opinion.

Petitioners were not wearing their hair in a desired style simply because it was the fashionable or accepted style, or because they somehow felt the need to register an inchoate discontent with the general malaise they might have perceived in our society. They were in fact attempting to broadcast a clear and specific message to their fellow students and others—their pride in being Indian. This, I believe, should clearly bring this case within the ambit of *Tinker* v. *Des Moines School District*, 393 U. S. 503, where we struck down a school policy which refused to allow students to wear black armbands in protest of the Vietnam war. We recognized that such armbands were closely akin to pure speech and were entitled to First Amendment protection, *id.*, at 505–506, at least where, as here,[2] there was no finding that the operation of the school was substantially endangered by the symbolic speech:

> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the

[2] Petitioners claim that "[r]espondents admitted that petitioners' traditional hairstyle has never caused any disruption in the school." Respondents do not contradict this statement, but only assert that the regulation on length of hair "bears a rational relationship to a legitimate state objective, i. e., that of instilling pride and initiative among the students leading to scholarship attainment and school spirit and morale."

operation of the school,' the prohibition cannot be sustained." *Id.*, at 509.

As previously noted, there was an opinion voiced by school officials that allowing petitioners to wear their hair in an Indian manner while restricting the hair length of white students would somehow be "disruptive," in that an "integrated school system cannot countenance *different groups* and remain *one* organization." But as we noted in *Tinker*, this Court long ago recognized that our constitutional system repudiates the idea that a State may conduct its schools to " 'foster a homogeneous people.' " *Id.*, at 511. In *Meyer* v. *Nebraska*, 262 U. S. 390, 402, the Court said:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

And in *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603, we stated:

> " 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker*, [364 U. S. 479,] 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out

> of a multitude of tongues, [rather] than through any kind of authoritative selection.' "

The effort to impose uniformity on petitioners is especially repugnant in view of the history of white treatment of the education of the American Indian. In the late 1800's, at about the same time that the Dawes Severalty Act of 1887 fragmented Indian tribal land holdings and allotted land to individual Indians with the effect of breaking up tribal structures,[3] the Bureau of Indian Affairs (BIA) began operating a system of boarding schools with the express policy of stripping the Indian child of his cultural heritage and identity:

> "Such schools were run in a rigid military fashion, with heavy emphasis on rustic vocational education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people." [4]

Again in 1944, a House Select Committee on Indian Affairs offered the same recommendation for achieving the " 'final solution of the Indian problem' ": " 'The goal of Indian education should be to make the Indian child a better American rather than to equip him simply to be a better Indian.' " [5]

A massive study by the Senate Special Subcommittee on Indian Education, "Indian Education: A National Tragedy—A National Challenge," S. Rep. No. 91–501, reviewed this policy, which it found rooted in a "self-righteous intolerance of tribal communities and cultural

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[3] See S. Rep. No. 91–501, p. 12; cf. Special Education Subcommittee of the National Council on Indian Opportunity, Between Two Milestones 69 (1972).

[4] S. Rep. No. 91–501, p. 12.

[5] See *id.*, at 13–14.

differences." *Id.*, at 21. The Subcommittee found that many teachers in BIA schools

> "still see their role as that of 'civilizing the native.' . . . One consequence of the unfortunate situation is a serious communications breakdown between student and staff and a serious lack of productive student-staff interactions.
>
> ". . . BIA administrators and teachers believe that Indians can choose only between total 'Indianness'—whatever that is—and complete assimilation into the dominant society. There seems to be little if any understanding of acculturation processes or the desirability of 'combining a firm cultural identity with occupational success and consequent self-esteem.'" *Id.*, at 61–62.

The same study found that similar attitudes often exist in public schools which educate Indian students.[6]

The results of such a policy, mirrored in the policy of the school in this case to force all students into one

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[6] "*Many school administrators and teachers consider Indian pupils inferior to white students, and thus expect them to fail, both in school and in life.*

"A. An anti-Indian attitude is often prevalent in white communities in which Indians receive public school education.

"B. Many school districts relegate Indians to the lowest level in their tracking systems.

"C. Some administrators refuse to cooperate with the Indian community in their school district and discourage or do not permit Indian participation in decisionmaking.

"D. Indians are often promoted each year regardless of grades just so they can be kept in school, thus assuring the local district of receiving Federal aid because of the presence of Indian students. One public school district goes so far as to falsify Indian achievement-test results because the students were so far behind national norms that 'it just wouldn't look good.'

"E. Teachers and administrators are often insensitive to Indian values and ignorant of Indian culture." *Id.*, at 53.

homogeneous mold even when it impinges on their racial and cultural values, have been disastrous for the young Indian child who is taught in school that the culture in which he has been reared is not important or valid. The Subcommittee recognized that such a coercive assimilation policy, denigrating and seeking to abolish cultural differences, frustrates Indian children and leads "[t]he community and child [to] retaliate by treating the school as an alien institution." *Id.*, at 21. At least in part as a result of such alienation, American Indians in both public and federal schools have a dropout rate twice the national average. *Id.*, at IX. Only 33% of Indians over the age of 25 have completed high school, and the median number of school years completed by this group is only 9.8.[7] Even when an Indian youth nominally remains in school, his achievement level is generally 2 to 3 years below that of white students in the same grade, and the Indian child falls progressively further behind the longer he remains in school.[8]

The issues in this case are far from trivial. I would grant certiorari.

No. 73–542. JULEO, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 483 F. 2d 47.

No. 73–546. BUTZ, SECRETARY OF AGRICULTURE *v.* CARTER ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 479 F. 2d 1084.

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[7] Bureau of the Census, Subject Report: American Indians, PC (2)–1F, p. 18 (Table 3) (1973).

[8] S. Rep. No. 91–501, p. IX; see Comptroller General of the United States, Report to the Congress: Opportunity to Improve Indian Education in Schools Operated by the Bureau of Indian Affairs 10 (1972).

No. 73–712. BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* BERMUDEZ ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 160 U. S. App. D. C. 150, 490 F. 2d 718.

No. 73–575. BRODY *v.* CHEMICAL BANK ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 482 F. 2d 1111.

No. 73–587. S. WALLACH CO., INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 41 App. Div. 2d 704, 340 N. Y. S. 2d 616.

No. 73–5611. PENN *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 480 F. 2d 921.

Rehearing Denied

No. 72–1652. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE *v.* HIBI, *ante*, p. 5;

No. 73–26. ALBERS, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 982;

No. 73–197. FRANK ET AL. *v.* WOLF ET AL., *ante*, p. 975; and

No. 73–5303. DUN LEAVAY *v.* LUTZ APPELLATE PRINTERS, INC., ET AL., *ante*, p. 992. Petitions for rehearing denied.

No. 72–6661. WRIGHT *v.* UNITED STATES, *ante*, p. 870; and

No. 73–5018. DE LEON *v.* UNITED STATES, *ante*, p. 853. Motions to file petitions for rehearing denied.

DECEMBER 17, 1973

Affirmed on Appeal

No. 73–519. TURNER ET AL. *v.* EGAN ET AL. Affirmed on appeal from D. C. Alaska. MR. JUSTICE DOUGLAS would postpone question of jurisdiction to hearing of case on the merits. Reported below: 358 F. Supp. 560.

No. 73–583. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Ky. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 369 F. Supp. 621.

No. 73–599. OUTPOST DEVELOPMENT CORP., DBA LYDIA FELDMAN METHODS *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. C. D. Cal. Reported below: 369 F. Supp. 399.

No. 73–601. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 373 F. Supp. 252.

No. 73–639. TEXAS-OKLAHOMA EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. D. Tex. Reported below: 369 F. Supp. 957.

No. 73–658. SEEHAWER ET AL. *v.* SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN ET AL. Affirmed on appeal from D. C. E. D. Wis. Reported below: 363 F. Supp. 635.

Appeals Dismissed

No. 73–656. VIRDEN ET UX., DBA CHILLED FRESH FRUIT CO. *v.* SCHAFFNER, DIRECTOR OF REVENUE OF MISSOURI. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 496 S. W. 2d 846.

No. 73–569. PETTY ET AL. *v.* MCDONALD, EXECUTRIX. Appeal from Sup. Ct. Ark. dismissed for want of sub-

stantial federal question. Reported below: 254 Ark. 705, 496 S. W. 2d 365.

No. 73–685. LEVINE *v.* BUSICK ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 63 N. J. 351, 307 A. 2d 571.

No. 73–682. PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY ET AL. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 82 Wash. 2d 232, 510 P. 2d 206.

Certiorari Granted—Vacated and Remanded

No. 73–202. MARGRAF *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed November 20, 1973, judgment vacated and case remanded for reconsideration in light of position presently asserted by the Government. Reported below: 483 F. 2d 708.

Miscellaneous Orders

No. ———. BOWMAN TRANSPORTATION, INC., ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM ET AL. Appeal from D. C. W. D. Ark. Motion of appellants to waive Rule 39 as to preparation of appendix to jurisdictional statement granted.

No. A–527. DISTRICT 65, NATIONAL COUNCIL OF DISTRIBUTIVE WORKERS OF AMERICA *v.* EISENBERG. C. A. 3d Cir. Application for stay of preliminary injunction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–533. BASS *v.* TEXAS. Application for stay of execution and enforcement of mandate of Court of Criminal Appeals of Texas presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–544. UNITED STATES BOARD OF PAROLE *v.* AMAYA. C. A. 5th Cir. Motion of respondent to vacate stay heretofore granted by MR. JUSTICE POWELL, denied.

No. A–545. MILLICAN, DBA HIP MAGAZINE *v.* UNITED STATES. C. A. 5th Cir. Application for stay and continuance of bond presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the application.

No. 36, Orig. TEXAS *v.* LOUISIANA. Motion of the United States for leave to intervene granted. [For earlier orders herein, see, *e. g., ante,* p. 904.]

No. 72–1490. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.; and

No. 72–1491. DOUGHERTY, EXECUTOR, ET AL. *v.* TEXACO INC. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 817.] Motion of Small Producers Group for leave to file a brief as *amicus curiae* granted.

No. 72–1554. SUPER TIRE ENGINEERING CO. ET AL. *v.* MCCORKLE ET AL. C. A. 3d Cir. [Certiorari granted, *ante,* p. 817.] Motion of Chamber of Commerce of the United States for leave to present oral argument as *amicus curiae* in support of petitioners denied.

No. 72–1589. RICHARDSON, COUNTY CLERK AND REGISTRAR OF VOTERS OF MENDOCINO COUNTY *v.* RAMIREZ ET AL. Sup. Ct. Cal. [Certiorari granted, *ante,* p. 816.] Motion of the Attorney General of California to present oral argument as *amicus curiae* in support of petitioner granted.

No. 72–1637. NATIONAL LABOR RELATIONS BOARD *v.* MAGNAVOX COMPANY OF TENNESSEE. C. A. 6th Cir. [Certiorari granted, *ante*, p. 817.] Motion of International Union of Electrical, Radio & Machine Workers, AFL–CIO–CLC, to present oral argument in support of petitioner denied.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 908.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 73–208. COLLINS ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.; and

No. 73–219. SANFORD ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeals from Ct. App. N. Y. Parties requested to file supplemental memoranda addressed to question whether these cases are moot or inappropriate for review at this time.

No. 73–327. WOODBURY ET AL. *v.* SPITLER. Sup. Ct. Ohio. Motion for leave to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motion.

No. 73–619. SAVE OUR CUMBERLAND MOUNTAINS, INC., ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Motion for leave to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motion.

No. 73–612. DEVORE ET AL. *v.* WEYERHAEUSER CO. Sup. Ct. Ore. Motion for leave to dispense with print-

ing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motion.

No. 73–686. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL.; and

No. 73–687. TELEPHONE USERS ASSN., INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Motions for leave to dispense with printing petitions denied with leave to file printed petitions in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motions. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 73–761. CHIPPAS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motion.

No. 73–763. HIGHTOWER *v.* INDIANA. Sup. Ct. Ind. Motion for leave to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 15, 1974. MR. JUSTICE STEWART would grant the motion.

No. 73–628. ALLENBERG COTTON CO., INC. *v.* PITTMAN. Appeal from Sup. Ct. Miss. Consideration of jurisdictional statement deferred to accord counsel for appellant opportunity to secure a certificate from the Supreme

Court of Mississippi as to whether the judgment herein was intended to rest on an adequate and independent state ground or on federal grounds. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 186 n. 1 (1945).

No. 73–5429. GRISSOM *v.* PHILLIPS, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 73–5558. MCCRAY *v.* LEWIS, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 73–640. GEDULDIG, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT *v.* AIELLO ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Reported below: 359 F. Supp. 792.

No. 73–5412. DILLARD ET AL. *v.* INDUSTRIAL COMMISSION OF VIRGINIA ET AL. Appeal from D. C. E. D. Va. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 347 F. Supp. 71.

Certiorari Granted

No. 73–29. CORNING GLASS WORKS *v.* BRENNAN, SECRETARY OF LABOR. C. A. 2d Cir.; and

No. 73–695. BRENNAN, SECRETARY OF LABOR *v.* CORNING GLASS WORKS. C. A. 3d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 73–29, 474 F. 2d 226; No. 73–695, 480 F. 2d 1254.

No. 73–532. AMERICAN POSTAL WORKERS UNION, AFL–CIO, DETROIT LOCAL *v.* INDEPENDENT POSTAL SYSTEM OF AMERICA, INC., ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 481 F. 2d 90.

No. 73–593. CENTRAL TABLET MANUFACTURING CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 481 F. 2d 954.

No. 73–662. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* COUNCILMAN. C. A. 10th Cir. Certiorari granted. Reported below: 481 F. 2d 613.

No. 73–629. KOSYDAR, TAX COMMISSIONER OF OHIO *v.* NATIONAL CASH REGISTER CO. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Reported below: 35 Ohio St. 2d 166, 298 N. E. 2d 559.

No. 73–5280. FULLER *v.* OREGON. Ct. App. Ore. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 12 Ore. App. 152, 504 P. 2d 1393.

Certiorari Denied

No. 72–6699. JONES *v.* GILMORE. C. A. 5th Cir. Certiorari denied.

No. 73–115. SCHLESINGER ET AL. *v.* TEITELBAUM, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 137.

No. 73–433. HARNEY ET AL. *v.* GRINER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–491. LIVINGSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–501. EARLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 53.

No. 73–516. SELIGSOHN *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 480 F. 2d 1121.

No. 73–518. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 482 F. 2d 1034.

No. 73–536. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–539. AVONSIDE NURSING HOME, INC. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied.

No. 73–543. FIRESTONE TIRE & RUBBER CO. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 481 F. 2d 246.

No. 73–614. CAMERARTS PUBLISHING CO., INC., ET AL. *v.* PRATHER. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 1406.

No. 73–620. GOVERNING BOARD OF TORRANCE UNIFIED SCHOOL DISTRICT *v.* LINDROS. Sup. Ct. Cal. Certiorari denied. Reported below: 9 Cal. 3d 524, 510 P. 2d 361.

No. 73–632. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 165.

No. 73–647. JENSEN *v.* GANT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–652. DARNELL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 627, 508 P. 2d 613.

No. 73–655. EDWARDS ET AL. *v.* CITY OF COLUMBUS. Sup. Ct. Ohio. Certiorari denied.

No. 73–663. WESSON *v.* LEVIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–667. MCLENNAN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 73–669. ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL. *v.* ALUMINUM COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 717.

No. 73–670. TRIAX CO. *v.* HARTMAN METAL FABRICATORS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 479 F. 2d 951.

No. 73–674. SAFE FLIGHT INSTRUMENT CORP. *v.* MCDONNELL DOUGLAS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 482 F. 2d 1086.

No. 73–680. SECHLER *v.* TRANS WORLD AIRLINES, INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–684. GANEM *v.* GANEM DE ISSA ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 269 So. 2d 740.

No. 73–692. MARTIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 9 Cal. 3d 687, 511 P. 2d 1161.

No. 73–713. CONTINENTAL CAN CO., INC. *v.* L. L. BREWTON LUMBER CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 923.

No. 73–5198. CARLSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied.

No. 73–5228. SMITH *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 88.

No. 73–5305. OLDS *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 301.

No. 73–5313. MURPHY *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–5367. RAMIREZ-VILLANUEVA *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 73–5380. KIMBROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 421.

No. 73–5447. HAGY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5455. MCCARTHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5469. PINKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 73–5472. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 304 A. 2d 28.

No. 73–5476. MURZYN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–5482. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 482 F. 2d 191.

No. 73–5485. PEDLAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5490. FOSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–5494. WOLCOTT *v.* NORTON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 513.

No. 73–5499. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1193.

No. 73–5507. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–5535. THERIAULT *v.* MOBILE CITY JAIL. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1193.

No. 73–5603. JACKSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 496 S. W. 2d 1.

No. 73–5638. MILAM *v.* LOCKHART, CORRECTIONAL SUPERINTENDENT. C. A. 8th Cir. Certiorari denied.

No. 73–5640. ANTWINE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 189.

No. 73–5652. WHITTINGTON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5655. METTER ET AL. *v.* JANSSEN. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 498 S. W. 2d 581.

No. 73–5663. FLORES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–5664. SERZYSKO *v.* CHASE MANHATTAN BANK. C. A. 2d Cir. Certiorari denied.

No. 73–5667. LOVE ET AL. *v.* DeCARLO HOMES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 613.

No. 73–40. WALLACE, ACTING WARDEN *v.* SMITH. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 473 F. 2d 877.

No. 73–256. PARRA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 Cal. App. 3d 729, 106 Cal. Rptr. 531.

No. 73–648. WOLFE *v.* METROPOLITAN DADE COUNTY ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 274 So. 2d 584.

No. 73–657. COX ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., LOCAL 1273, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 476 F. 2d 1287.

No. 73–688. LITTLEJOHN *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1140.

No. 73–5456. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 229.

No. 73–5637. WRIGHT *v.* BENNETT, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5748. HOLMES *v.* BURR, SHERIFF. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 55.

No. 73–691. HYDE PARK MEDICAL LABORATORY, INC., ET AL. *v.* ILLINOIS DEPARTMENT OF PUBLIC AID ET AL. C. A. 7th Cir. Motion for fees, costs, and damages for delay under Rule 56 (4) of the Rules of this Court denied. Certiorari denied.

No. 73–348. BAGGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE took no

part in the consideration or decision of this petition. Reported below: 481 F. 2d 114.

Rehearing Denied

No. 72–1529. UNITED STATES *v.* DOWDY, *ante*, p. 823;

No. 72–1584. DOWDY *v.* UNITED STATES, *ante*, p. 866;

No. 73–5091. PERRY *v.* UNITED STATES, *ante*, p. 1005;

No. 73–5184. ANDERSON *v.* UNITED STATES, *ante*, p. 1007;

No. 73–5298. SLAUGHTER *v.* CALIFORNIA, *ante*, p. 1010;

No. 73–5334. DURHAM *v.* MACDONALD, *ante*, p. 1027;

No. 73–5361. RENDEL *v.* GOMES, PRISON SUPERINTENDENT, ET AL., *ante*, p. 1027; and

No. 73–5362. HAMBURG ET UX. *v.* JONES ET UX., *ante*, p. 1027. Petitions for rehearing denied.

No. 72–6810. DULLES ET AL. *v.* FIDUCIARY TRUST CO., *ante*, p. 844. Motion for leave to file petition for rehearing denied.

DECEMBER 20, 1973

Miscellaneous Order

No. A–608. FEDERAL POWER COMMISSION *v.* CONSUMER FEDERATION OF AMERICA ET AL. Application to vacate stay entered by the United States Court of Appeals for the District of Columbia Circuit presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS dissents from vacating stay. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this application.

JANUARY 7, 1974

Affirmed on Appeal

No. 73–736. KISTER ET AL. *v.* OHIO BOARD OF REGENTS ET AL. Affirmed on appeal from D. C. S. D. Ohio. Reported below: 365 F. Supp. 27.

Appeals Dismissed

No. 73–360. MOORE, GOVERNOR OF WEST VIRGINIA *v.* KELLY, TREASURER OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. Reported below: —— W. Va. ——, 197 S. E. 2d 106.

No. 73–384. HANDLER ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 73–630. TOWER PLAZA INVESTMENTS, LTD., ET AL. *v.* DEWITT ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of substantial federal question. Reported below: 109 Ariz. 248, 508 P. 2d 324.

No. 73–5360. NEWTON *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 73–5261. BOSWELL *v.* ALABAMA. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 290 Ala. 349, 276 So. 2d 592.

Vacated and Remanded on Appeal

No. 73–386. SHARP *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Judgment vacated and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE

DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction. Reported below: 495 S. W. 2d 906.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellant was convicted for exhibiting an obscene motion picture in violation of Texas Penal Code, Art. 527, § 3 (Supp. 1973), which provides:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Obscenity for purposes of Art. 527 is defined in § 1:

> "(A) 'Obscene' material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.
>
> "(B) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible

audience, the appeal of the subject matter shall be judged with reference to such audience."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, when tested by that constitutional standard, the word "obscene" in § 3, read as defined in § 1, renders § 3 unconstitutionally overbroad and therefore facially invalid.

For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore vacate the judgment below and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent. In that circumstance, I have no occasion to consider at this time whether, if § 1 were properly narrowed, appellant's challenge to the constitutionality of § 9 of Art. 527, pursuant to which the subject film was seized, would merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

No. 73–715. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* MAYO. C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Wainwright* v. *Stone, ante,* p. 21.

Certiorari Granted—Vacated and Remanded

No. 73–200. SPLAWN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v.

California, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted on charges of selling obscene motion pictures in violation of § 311.2 (a) of the California Penal Code (1970), which provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2 (a) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the

judgment of the Court of Appeal of California, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

No. 73–318. NISSINOFF ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123 (1973); *United States* v. *Orito*, 413 U. S. 139 (1973); *Heller* v. *New York*, 413 U. S. 483 (1973); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); and *Alexander* v. *Virginia*, 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted on charges of exhibiting obscene motion pictures in violation of the California Penal Code § 311.2 (a) (1970), which provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to

distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2 (a) is unconstitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Alameda, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent.

Miscellaneous Orders

No. A–587 (73–921). GROSSMAN *v.* STATE BAR GRIEVANCE BOARD ET AL. Sup. Ct. Mich. Application for stay of order of the Supreme Court of Michigan presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 390 Mich. 157, 211 N. W. 2d 21.

No. A–635. FRANKS *v.* WILSON, JUDGE, ET AL. Application for stay of execution and enforcement of judgment of the United States District Court for the District of Colorado presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–12. IN RE DISBARMENT OF ISAACSON. It having been reported to this Court that John T. Isaacson,

of St. Louis, Missouri, has been disbarred from the practice of law in all of the courts of the State of Missouri, and this Court by order of October 23, 1973 [*ante*, p. 971], having suspended the said John T. Isaacson from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return to the rule has expired;

It is ordered that the said John T. Isaacson be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–13. IN RE DISBARMENT OF LEHRER. It having been reported to this Court that Isadore Albert Lehrer, of Washington, D. C., has been disbarred from the practice of law in all of the courts of the District of Columbia, and this Court by order of October 23, 1973 [*ante*, p. 971], having suspended the said Isadore Albert Lehrer from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued upon the respondent and that the time within which to file a return to the rule has expired;

It is ordered that the said Isadore Albert Lehrer be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–18. IN RE DISBARMENT OF STANTON. John J. Stanton, of Boston, Massachusetts, having requested

to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on November 12, 1973 [*ante*, p. 1020], is hereby discharged.

No. 72–1554. SUPER TIRE ENGINEERING CO. ET AL. *v.* McCORKLE ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 817.] Motion of respondent Teamsters Local 676 for divided argument granted. Motion of Southern California District Council of Laborers for leave to file a brief as *amicus curiae* granted.

No. 72–1598. NATIONAL LABOR RELATIONS BOARD *v.* BELL AEROSPACE CO., DIVISION OF TEXTRON, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 816.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted.

No. 72–1628. TELEPROMPTER CORP. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 817.] Motions of National Broadcasting Co., Inc., Writers Guild of America et al., and Authors League of America, Inc., for leave to file briefs as *amici curiae* granted.

No. 72–6160. MITCHELL *v.* W. T. GRANT CO. Sup. Ct. La. [Certiorari granted, 411 U. S. 981.] Motion of M. Truman Woodward, Jr., et al. for leave to file a brief as *amici curiae* denied.

No. 73–38. UNITED STATES *v.* MARINE BANCORPORATION, INC., ET AL. Appeal from D. C. W. D. Wash. [Probable jurisdiction noted, *ante*, p. 907.] Joint motion of appellees to dismiss appeal denied.

No. 73–88. UNITED STATES *v.* EDWARDS ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 818.] Motion of

respondents for appointment of counsel granted. It is ordered that Thomas R. Smith, Esquire, of Cincinnati, Ohio, be, and he is hereby, appointed to serve as counsel for respondents in this case.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 908.] Motions of Southern California Edison Co. and American College of Trial Lawyers for leave to file briefs as *amici curiae* granted.

No. 73–312. LIBERTY MUTUAL INSURANCE CO. *v.* DREW. C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1038.] Motions of Bloomfield Hills School District et al., School Town of Speedway, Indiana, et al., and Jewish Rights Council for leave to file briefs as *amici curiae* granted.

No. 73–487. BREWER *v.* UNITED STATES. C. A. 10th Cir. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 22, 1974.

No. 73–705. BARON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 22, 1974.

No. 73–714. IMEL ET AL. *v.* ZOHN MANUFACTURING CO. ET AL. C. A. 10th Cir. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 22, 1974.

No. 73–5726. THOMAS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of certiorari denied.

No. 73–5780. KOCHEL *v.* O'DONNELL, JUDGE. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 73–754. PROCUNIER, CORRECTIONS DIRECTOR *v.* HILLERY ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 364 F. Supp. 196.

No. 73–767. UNITED STATES *v.* CONNECTICUT NATIONAL BANK ET AL. Appeal from D. C. Conn. Probable jurisdiction noted and case set for oral argument with No. 73–38 [*United States* v. *Marine Bancorporation, Inc.*, probable jurisdiction noted, *ante*, p. 907]. Reported below: 362 F. Supp. 240.

Certiorari Granted

No. 73–582. CITY OF PITTSBURGH *v.* ALCO PARKING CORP. ET AL. Sup. Ct. Pa. Certiorari granted. Reported below: 453 Pa. 245, 307 A. 2d 851.

No. 73–718. BANGOR PUNTA OPERATIONS, INC., ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 482 F. 2d 865.

No. 73–726. COOPER STEVEDORING CO., INC. *v.* FRITZ KOPKE, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 479 F. 2d 1041.

No. 73–604. CASS *v.* UNITED STATES; and

No. 73–5661. ADAMS ET AL. *v.* SECRETARY OF THE NAVY ET AL. C. A. 9th Cir. Motion of petitioners in No. 73–5661 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 483 F. 2d 220.

No. 73–641. SNOW ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari granted. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 482 F. 2d 1029.

No. 73–786. ROSS ET AL. *v.* MOFFITT. C. A. 4th Cir. Motion of respondent to dispense with printing brief in opposition and certiorari granted. Reported below: 483 F. 2d 650.

No. 73–831. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO. C. A. 3d Cir. Certiorari granted. The Solicitor General is invited to file a response to respondent's motion for leave to proceed *in forma pauperis* on or before January 16, 1974. Respondent's reapplication to vacate stay heretofore granted by MR. JUSTICE BRENNAN denied. MR. JUSTICE DOUGLAS would vacate stay. Reported below: 483 F. 2d 656.

Certiorari Denied. (See also No. 73–5261, *supra.*)

No. 73–283. ZAPATA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 493 S. W. 2d 801.

No. 73–478. FREEDMAN *v.* MORRISSEY ET AL.;

No. 73–611. MORRISSEY ET AL. *v.* CURRAN ET AL.; and

No. 73–5689. PERRY *v.* MORRISSEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 480.

No. 73–504. BRADLEY ET AL., DBA BRADLEY BROTHERS CLEANERS & LAUNDERERS *v.* BRENNAN, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied.

No. 73–513. TORRALVO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–527. CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–535. SALAZAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–541. BAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 480 F. 2d 921.

No. 73–578. YASSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 482 F. 2d 1183.

No. 73–590. VARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 1052.

No. 73–591. EPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 73–594. LOCAL 365, CEMETERY WORKERS GREEN ATTENDANTS BUILDING SERVICE UNION EMPLOYEES INTERNATIONAL, AFL–CIO, ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 582, 301 N. E. 2d 434.

No. 73–598. MARCHIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–603. TRAMUNTI *v.* BAUMAN, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–608. HOUSTON CHRONICLE PUBLISHING CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1240.

No. 73–617. CHOTIN, EXECUTOR *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 882.

No. 73–618. HARRISON PROPERTY MANAGEMENT CO., INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 77, 475 F. 2d 623.

No. 73–636. COKER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 593.

No. 73–646. KROWCZYK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–653. WASHINGTON *v.* FOX ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 82 Wash. 2d 289, 510 P. 2d 230.

No. 73–654. TRI-STATE STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 477 F. 2d 204.

No. 73–693. PENNSYLVANIA ET AL. *v.* COUNTY OF BUCKS ET AL. Sup. Ct. Pa. Certiorari denied.

No. 73–699. LEE *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 482 F. 2d 1040.

No. 73–706. PEUSCH *v.* CITY OF JACKSON. Sup. Ct. Miss. Certiorari denied. Reported below: 280 So. 2d 837.

No. 73–725. CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY *v.* SCHOOL CITY OF ELKHART ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 299 N. E. 2d 829.

No. 73–728. CITY OF MIAMI *v.* SPICY. Sup. Ct. Fla. Certiorari denied. Reported below: 280 So. 2d 419.

No. 73–738. ARISON SHIPPING CO. ET AL. *v.* KLOSTERS REDERI A/S, DBA NORWEGIAN SHIPPING LINES. Sup. Ct. Fla. Certiorari denied. Reported below: 280 So. 2d 678.

No. 73–740. CHICAGO & SUBURBAN REFUSE DISPOSAL ASSN. ET AL. *v.* A. CHERNEY DISPOSAL CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 751.

No. 73–742. TIMPANY, TRUSTEE IN REORGANIZATION *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 208.

No. 73–749. ADLER *v.* MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 453 Pa. 60, 311 A. 2d 634.

No. 73–750. BLAZ, DIRECTOR OF REVENUE AND TAXATION OF GUAM *v.* MANNING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 479 F. 2d 333.

No. 73–756. WOODALL INDUSTRIES, INC. *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 483 F. 2d 986.

No. 73–771. ANDERSON, T/A ANDERSON'S TEXACO SERVICE STATION, ET AL. *v.* DUNLOP ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 485 F. 2d 666.

No. 73–827. COLORADO CORP. ET AL. *v.* BAER, TRUSTEE IN BANKRUPTCY. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 552.

No. 73–5234. CORBETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 493 S. W. 2d 940.

No. 73–5282. BLOETH *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5308. SCHNEIDER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 73–5311. NEWKIRK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 73–5317. GATHERIGHT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 9 Ill. App. 3d 1058, 293 N. E. 2d 734.

No. 73–5344. DUPREE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–5366. COLLINS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 916, 300 N. E. 2d 436.

No. 73–5376. BROWN *v.* CULLEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–5388. FITZGERALD ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 190 Neb. 436, 208 N. W. 2d 688.

No. 73–5394. BECK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 483 F. 2d 203.

No. 73–5399. WHITE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5404. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 496 S. W. 2d 566.

No. 73–5424. WASHINGTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 283 N. C. 175, 195 S. E. 2d 534.

No. 73–5438. MATHERS *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–5464. THOMAS *v.* TWOMEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 2d 1406.

No. 73–5478. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5479. LAWSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 483 F. 2d 535.

No. 73–5480. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5497. KAPPAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–5500. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5515. FAULKNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5516. MCINTYRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5525. ZUMBERGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5527. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–5531. DIANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5543. DIXON *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 73–5578. ELLINGBURG *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 73–5581. SCOTT *v.* CROCKER, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 73–5618. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 652.

No. 73–5624. HAZZARD *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5683. WILLIAMS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–5696. KREAGER *v.* GENERAL ELECTRIC CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5697. SCHENK *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–5698. LETBEDDER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 129 Ga. App. 196, 199 S. E. 2d 270.

No. 73–5706. WATKINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–5707. OLIVER *v.* HARRISON COUNTY CLERK, MARSHALL, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 1403.

No. 73–5712. CHAVEZ *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 90.

No. 73–5718. LODDY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied.

No. 73–5738. BLAIR *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 73–5741. OLDEN *v.* MCCARTHY, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 73–5743. CARUSO *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 211 N. W. 2d 133.

No. 73–5749. ROSE *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5765. TILLEY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 73–247. HOLZMAN, TRUSTEE IN BANKRUPTCY *v.* L. H. J. ENTERPRISES, INC. C. A. 9th Cir. Motion of respondent to dispense with printing brief in opposition granted. Certiorari denied. Reported below: 476 F. 2d 949.

No. 73–421. VEED *v.* SCHWARTZKOPF ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–432. ESPOSITO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 6.

No. 73–561. DIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–571. GRAVITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 375.

No. 73–681. WALLACE ET AL. *v.* KERN ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 621.

No. 72–753. CAPUTO ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. MR.

JUSTICE DOUGLAS would grant certiorari. Reported below: 41 App. Div. 2d 165, 341 N. Y. S. 2d 920.

No. 73–769. HANSON, DBA HANSON PAINT & GLASS CO. *v.* PITTSBURGH PLATE GLASS INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 220.

No. 73–5260. GILBERT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5354. FORD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5420. BROWN *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 622.

No. 73–5423. BUGARIN-CASAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 484 F. 2d 853.

No. 73–5427. VUCCI ET AL. *v.* BOSLOW, INSTITUTION DIRECTOR. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 269 Md. 331, 305 A. 2d 833.

No. 73–5524. ELIAS-DOJAQUEZ *v.* UNITED STATES; and

No. 73–5541. RIVERA-CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5526. ACKERMAN ET AL. *v.* BOGUE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5549. POLLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 929.

No. 73–5628. HENDERSON *v.* HALBERT, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5665. GUERRERO ET AL. *v.* SWOAP, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 9 Cal. 3d 808, 512 P. 2d 833.

No. 73–5733. FITTS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 1401.

No. 73–760. TOMOW ET AL. *v.* MENOMINEE ENTERPRISES, INC., ET AL. Sup. Ct. Wis. Motions of National Congress of American Indians et al. and Association on American Indian Affairs, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 60 Wis. 2d 1, 208 N. W. 2d 824.

No. 73–772. DALY ET AL. *v.* NATURAL RESOURCES BOARD. Sup. Ct. Wis. Motion of National Congress of American Indians et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 60 Wis. 2d 208, 208 N. W. 2d 839.

Rehearing Denied

No. 72–1558. STEIN, ADMINISTRATRIX, ET AL. *v.* LEWISVILLE INDEPENDENT SCHOOL DISTRICT ET AL., *ante*, p. 948. Motion for leave to file petition for rehearing denied.

No. 72–922. PASCHALL ET AL. *v.* CHRISTIE-STEWART, INC., ET AL., *ante*, p. 100;

No. 72–1612. CONNOR *v.* ARKANSAS, *ante*, p. 991;

No. 72–1733. MUSSER *v.* UNITED STATES, *ante*, p. 31;

No. 72–6799. CANFIELD *v.* OKLAHOMA, *ante*, p. 991;

No. 72–6880. SMITH ET UX. *v.* REEDER ET UX., *ante*, p. 991;

No. 72–6936. FARKAS *v.* LING-TEMCO-VOUGHT, INC., *ante*, p. 850;

No. 73–334. MATANKY *v.* UNITED STATES, *ante*, p. 1039;

No. 73–353. ABBOTT ET AL. *v.* UNITED STATES, *ante*, p. 1024;

No. 73–363. NIX *v.* GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, *ante*, p. 1024;

No. 73–368. HERNANDEZ *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL., *ante*, p. 1021;

No. 73–372. HARVEY *v.* SAULNIER ET AL., *ante*, p. 1025;

No. 73–391. BEHRING PROPERTIES, INC., ET AL. *v.* SUN OIL CO., *ante*, p. 1039;

No. 73–415. TITUS *v.* SUPREME COURT OF VIRGINIA ET AL., *ante*, p. 1034;

No. 73–5307. HINES *v.* ALABAMA, *ante*, p. 1010;

No. 73–5342. MAYS *v.* WARNER, SECRETARY OF THE NAVY, *ante*, p. 1041; and

No. 73–5442. HULL *v.* ST. ELIZABETHS HOSPITAL ET AL., *ante*, p. 1043. Petitions for rehearing denied.

No. 72–1532. PETERSON *v.* STANCZAK ET AL., *ante*, p. 823; and

No. 73–79. JENNINGS *v.* CANOTT, *ante*, p. 892. Motions to dispense with printing granted. Motions for leave to file petitions for rehearing denied.

No. 72–1582. JOHNSON *v.* CITY OF CHEYENNE ET AL., *ante*, p. 990;

No. 73–10. JOHNSON *v.* LARAMIE COUNTY SCHOOL DISTRICT No. 1, *ante*, p. 990; and

No. 73–308. COTA *v.* CHANDLER ET AL., *ante*, p. 1003. Motions to dispense with printing granted. Petitions for rehearing denied.

JANUARY 8, 1974

Dismissal Under Rule 60

No. 73–774. MERCANTILE NATIONAL BANK *v.* BARCLAYS BANK D. C. O. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 481 F. 2d 1224.

JANUARY 14, 1974

Affirmed on Appeal

No. 73–5776. NEWTON *v.* BURGIN ET AL. Affirmed on appeal from D. C. W. D. N. C. MR. JUSTICE DOUGLAS dissents from affirmance. Reported below: 363 F. Supp. 782.

Appeal Dismissed

No. 73–5337. PAYNE *v.* FOX, JUDGE. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS dissents from dismissal of appeal and denial of certiorari.

Certiorari Granted—Vacated and Remanded

No. 72–1462. MULLANEY ET AL. *v.* WILBUR. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *State* v. *Lafferty*, 309 A. 2d 647 (Me. 1973). Reported below: 473 F. 2d 943.

Miscellaneous Orders

No. A–627. LIVIERI ET AL. *v.* UNITED STATES ET AL. Application for stay of execution and enforcement of judgment of the United States District Court for the District of Connecticut (Civil No. 15,741), presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–15. IN RE DISBARMENT OF SEVIN. Marshall Howard Sevin, of Century City, California, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on October 23, 1973 [*ante*, p. 971], is hereby discharged.

No. 72–1035. CURTIS *v.* LOETHER ET AL. C. A. 7th Cir. [Certiorari granted, 412 U. S. 937.] Motion of petitioner to change name of petitioner from Julia Rogers to Julia Rogers Curtis granted.

No. 72–1570. DONNELLY *v.* DECHRISTOFORO. C. A. 1st Cir. [Certiorari granted, *ante*, p. 974.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted.

No. 72–1603. CARDWELL, WARDEN *v.* LEWIS. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1062.] Motion of respondent for appointment of counsel granted. It is ordered that Bruce A. Campbell, Esquire, of Columbus, Ohio, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–62. WHEELER ET AL. *v.* BARRERA ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 908.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Motion of the United States for leave to participate in oral argument as *amicus*

curiae in support of respondents granted and 15 additional minutes allotted for that purpose. Petitioners allotted 15 additional minutes for oral argument.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, *ante,* p. 908.] Motion of respondents for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Petitioners also allotted 15 additional minutes for oral argument.

No. 73–364. AMERIND *v.* MANCARI ET AL. Appeal from D. C. N. M. Motion to dispense with printing jurisdictional statement denied with leave to file printed jurisdictional statement in conformity with Rule 39 of the Rules of this Court on or before January 29, 1974. Reported below: 359 F. Supp. 585.

No. 73–773. MCNEILL *v.* FISHER ET AL. Ct. App. D. C. Motion to dispense with printing petition denied with leave to file printed petition in conformity with Rule 39 of the Rules of this Court on or before January 29, 1974.

No. 73–570. SOUTHWIRE CO. ET AL. *v.* METAL EQUIPMENT CO., *ante,* p. 1092. Motion of respondent for damages for delay caused by petition for certiorari denied.

No. 73–899. MOODY ET AL. *v.* ALBEMARLE PAPER CO. ET AL.; AND WILLIAMS *v.* ALBEMARLE CITY BOARD OF EDUCATION. Parties granted leave and are invited to file briefs on or before February 13, 1974, in form specified by Rule 39 of the Rules of this Court, in response to question certified by the United States Court of Appeals for the Fourth Circuit. Reported below: See 474 F. 2d 134 and 485 F. 2d 232.

No. 73–5284. DORSZYNSKI *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1091.] Motion of petitioner for appointment of counsel granted. It is ordered that Robert H. Friebert, Esquire, of Milwaukee, Wisconsin, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 73–5615. CODISPOTI ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. [Certiorari granted, *ante*, p. 1063.] Motion of Robert L. Eberhardt, Esquire, for leave to present oral argument *pro hac vice* on behalf of respondent granted.

No. 73–5781. MADDEN *v.* CIRCUIT COURT FOR DODGE COUNTY ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed.

No. 73–362. MORTON, SECRETARY OF THE INTERIOR, ET AL. *v.* MANCARI ET AL. Appeal from D. C. N. M. Motion to dispense with printing motion to dismiss or affirm denied. Probable jurisdiction noted. Reported below: 359 F. Supp. 585.

No. 73–797. MIAMI HERALD PUBLISHING CO., DIVISION OF KNIGHT NEWSPAPERS, INC. *v.* TORNILLO. Appeal from Sup. Ct. Fla. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 287 So. 2d 78.

Certiorari Granted

No. 73–437. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–457. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 73–464. MUNICIPAL DISTRIBUTORS GROUP *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certio-

rari granted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 483 F. 2d 880.

No. 73–300. SAXBE, ATTORNEY GENERAL, ET AL. *v.* BUSTOS ET AL.; and

No. 73–480. CARDONA ET AL. *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 156 U. S. App. D. C. 304, 481 F. 2d 479.

No. 73–507. HAMLING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Case set for oral argument with No. 73–557 [*Jenkins* v. *Georgia*, probable jurisdiction noted, *ante*, p. 1090]. Reported below: 481 F. 2d 307.

Certiorari Denied. (See also No. 73–5337, *supra.*)

No. 72–1107. BERBLING ET AL. *v.* LITTLETON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 468 F. 2d 389.

No. 73–560. CHINESE MARITIME TRUST, LTD. *v.* PANAMA CANAL CO. C. A. 2d Cir. Certiorari denied. Reported below: 478 F. 2d 1357.

No. 73–566. BAUER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 73–676. INDUSTRIAL LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 481 F. 2d 609.

No. 73–683. BRASWELL MOTOR FREIGHT LINES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 594.

No. 73–783. LICHTENSTEIN *v.* LICHTENSTEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 481 F. 2d 682.

No. 73–784. CITY OF CHICAGO ET AL. *v.* GAUTREAUX ET AL.; and

No. 73–785. CHICAGO HOUSING AUTHORITY *v.* GAUTREAUX ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 480 F. 2d 210.

No. 73–789. HOISTING & PORTABLE ENGINEERS, LOCAL 450, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO *v.* PENCE CONSTRUCTION CORP. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 398.

No. 73–790. LEAS *v.* SHERER. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 1406.

No. 73–792. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS ET AL. *v.* ROTA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 998.

No. 73–5297. JONES *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–5353. THOMPSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 481 F. 2d 650.

No. 73–5375. GILL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 54 Ill. 2d 357, 297 N. E. 2d 135.

No. 73–5413. RODRIGUEZ *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–5414. ROOTS *v.* AIRTH. C. A. 5th Cir. Certiorari denied.

No. 73–5536. NEWKIRK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 481 F. 2d 881.

No. 73–5538. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5546. KEEGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 923.

No. 73–5548. BENSON *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 478 F. 2d 152.

No. 73–5758. LUZAICH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 224 Pa. Super. 748, 301 A. 2d 904.

No. 73–5775. PATRICK *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–5782. GIBSON *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5786. TINSLEY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 495 S. W. 2d 776.

No. 73–5792. PATE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 109 Ariz. 506, 513 P. 2d 935.

No. 73–5794. ALLISON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 129 Ga. App. 364, 199 S. E. 2d 587.

No. 73–5795. SASO *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–5797. CHAMBERLAIN *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1404.

No. 73–5800. BIES *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1407.

No. 72–1416. AGUAYO ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 1090.

No. 72–6951. LEBLANC *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 481.

No. 73–637. DENTON *v.* SEAMANS, SECRETARY OF THE AIR FORCE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 21.

No. 73–671. MAYER PAVING & ASPHALT CO. ET AL. *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 763.

No. 73–5269. GUTIERREZ *v.* DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 701.

No. 73–5644. MCCHESNEY *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 1101.

No. 73–91. CHEVRON OIL COMPANY, WESTERN DIVISION, ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 475 F. 2d 842.

No. 73–751. PALM BEACH NEWSPAPERS, INC., ET AL. *v.* EARLY. Cir. Ct. Fla., Broward County. Motions of

Miami Herald Publishing Co., a Division of Knight Newspapers, Inc., et al., and American Newspaper Publishers Assn. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: See 274 So. 2d 890.

Rehearing Denied

No. 72–6748. WALDRON *v.* UNITED STATES, *ante*, p. 31;

No. 72–6800. GOAD *v.* ANDERSON, WARDEN, *ante*, p. 1043;

No. 73–404. DEPENDENT SCHOOL DISTRICT No. D–20 OF CADDO COUNTY ET AL. *v.* PARKER, COUNTY SUPERINTENDENT OF SCHOOLS, *ante*, p. 1035;

No. 73–418. HUTUL *v.* CHICAGO BAR ASSN., *ante*, p. 1040;

No. 73–502. STRUMSKIS *v.* UNITED STATES, *ante*, p. 1067;

No. 73–5151. WATSON *v.* AULT, WARDEN, *ante*, p. 1069;

No. 73–5181. WILLIAMS *v.* CALIFORNIA, *ante*, p. 1041;

No. 73–5441. THIBADOUX *v.* WARDEN, CLINTON CORRECTIONAL FACILITY, *ante*, p. 1071;

No. 73–5474. PALLER *v.* PALLER, *ante*, p. 1072; and

No. 73–5481. SAYLES *v.* MCGUIRE, U. S. DISTRICT JUDGE, *ante*, p. 1059. Petitions for rehearing denied.

No. 73–275. ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. *v.* LOUISIANA;

No. 73–335. ILLINOIS CENTRAL RAILROAD CO., NOW ILLINOIS CENTRAL GULF RAILROAD *v.* LOUISIANA;

No. 73–340. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LOUISIANA;

No. 73–341. TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS *v.* LOUISIANA; and

No. 73–342. LOUISIANA & ARKANSAS RAILWAY CO. *v.* LOUISIANA, *ante*, p. 991. Motion of Association of

American Railroads for leave to file a brief as *amicus curiae* in support of petition for rehearing in No. 73–275 granted. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and these petitions.

No. 73–116. ROCKS *v.* UNITED STATES, *ante*, p. 1044. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 73–394. MORGAN *v.* AUTOMOBILE MANUFACTURERS ASSN., INC., ET AL., *ante*, p. 1045. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

JANUARY 21, 1974

Appeals Dismissed

No. 73–668. FIELDS *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS dissents from dismissal of appeal. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction. Reported below: 279 So. 2d 822.

No. 73–5359. IN RE GOALEN. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 30 Utah 2d 27, 512 P. 2d 1028.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Ronald Easthope, currently an inmate in the Utah State Prison, and appellant Ann Goalen desire to marry. Both are of legal age and are competent to enter into

marriage under state law. Section 76–1–36, Utah Code Ann. (1953), provides:

> "A sentence of imprisonment in the state prison for any term less than for life suspends all civil rights of the person so sentenced during such imprisonment, and forfeits all private trusts and all public offices, authority or power."

In implementation of this statute, the Utah State Board of Corrections promulgated Policy No. 36:

> "It shall be the policy of the Board of Corrections that the Warden may, upon the recommendation of the treatment team, authorize inmates nearing their release dates to marry."

This policy has been interpreted and applied by the state corrections officials to permit marriage by an inmate only when he is within six months of release if the marriage is recommended by the treatment team. Easthope and appellant conveyed their desire to marry to the warden of the Utah State Prison, who determined that Easthope was not within the terms of the policy and denied permission for the marriage to take place. Appellant then brought this action for mandamus in the state courts to require the warden to sanction the marriage.

Appellant contends that the freedom to marry is constitutionally protected and that the State of Utah cannot prohibit her marriage to Easthope in the absence of some compelling state interest. The interest that the State has asserted in support of its policy is that the denial of such civil rights, in conjunction with their gradual return to the convict, "acts as an incentive for the convict to aid in his own rehabilitation." The Utah courts have denied the appellant any relief, and the State Supreme Court explicitly rejected the appellant's constitutional claim.

In *Loving* v. *Virginia*, 388 U. S. 1 (1967), the Court expressly recognized that the right to marry is one of the fundamental liberties embodied in the Due Process Clause of the Fourteenth Amendment. See also *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942). Just last Term, the Court reaffirmed the principle of those cases. *Roe* v. *Wade*, 410 U. S. 113 (1973). The extent to which this right may be diluted for one in prison is something the Court has never decided. In this case the State asserts no security or discipline problems that would arise by permitting the marriage. The State's only interest appears to be to utilize the wholesale denial and subsequent "gradual return" of prisoners' civil rights as an incentive to encourage their cooperation in corrective programs. While this may or may not constitute good psychology and sound corrections policy, I think there is a serious question whether this state policy is sufficient to overcome the appellant's constitutional claim.

I would not, however, note probable jurisdiction and set this case for oral argument. The State has suggested that the issue presented may well have been mooted when Utah Code Ann. § 76–1–36 (1953), on which Policy No. 36 was predicated, was recently repealed by the legislature. Accordingly, I would vacate the judgment of the Utah Supreme Court and remand the case to that court to consider whether the repeal of the statute has operated to nullify the Board of Corrections' Policy No. 36.

No. 73–5675. TARLTON *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 72–930. UNITED STATES STEEL CORP. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. Certi-

orari granted, judgment vacated, and case remanded for further consideration in light of *Gateway Coal Co.* v. *United Mine Workers of America, ante,* p. 368. MR. JUSTICE DOUGLAS dissents from vacation and remand. Reported below: 469 F. 2d 729.

No. 72–6155. CIOTTI *v.* UNITED STATES. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Maze, ante,* p. 395. Reported below: 469 F. 2d 1204.

No. 73–354. LITTLE ART CORP., DBA ART 16 THEATRE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-Ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973); *Heller* v. *New York,* 413 U. S. 483 (1973); *Roaden* v. *Kentucky,* 413 U. S. 496 (1973); and *Alexander* v. *Virginia,* 413 U. S. 836 (1973). MR. JUSTICE DOUGLAS, being of the view that state obscenity regulation is prohibited by the Fourteenth and First Amendments (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment of conviction. Reported below: 190 Neb. 289, 207 N. W. 2d 527.

MR. JUSTICE BRENNAN, whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted on charges of circulating and publishing allegedly obscene motion pictures in violation of § 28–921 of the Nebraska Revised Statutes (Supp. 1972), which provides as follows:

> "Whoever knowingly sells or offers for sale, or gives to another, or otherwise circulates or publishes or

causes to be circulated or published, or has in his possession with intent to sell, loan, or give to another, or to otherwise circulate or publish or cause to be circulated or published, any obscene, lewd, indecent, or lascivious book, pamphlet, paper, movie films, drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument or article of obscene, lewd, indecent or lascivious use, or advertises the same for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased or otherwise obtained or made, shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both . . . ."

The "standard for judging obscenity" in prosecutions brought under § 28–921, set out in § 28–926.07 (1964), is

> "whether to the average person the dominant theme of said material or conduct which is at issue in such . . . criminal proceedings, taken as a whole, appeals to the prurient interest, which is to excite lustful thoughts, or a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond the customary limits of candor."

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (dissent-

ing opinion). It is clear that, tested by that constitutional standard, § 28–921 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Supreme Court of Nebraska, and remand for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*. In that circumstance, I have no occasion to consider whether the questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Miscellaneous Orders

No. 73–1315. MORNINGSIDE RENEWAL COUNCIL, INC., ET AL. *v.* UNITED STATES ATOMIC ENERGY COMMISSION ET AL. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied.

No. D–14. IN RE DISBARMENT OF MACLEOD. It having been reported to this Court that Douglas C. MacLeod, of St. Louis, Missouri, has been indefinitely suspended from the practice of law in all of the courts of the State of Missouri, and this Court by order of October 23, 1973 [*ante*, p. 971], having suspended the said Douglas C. MacLeod from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response thereto has been filed;

It is ordered that the said Douglas C. MacLeod be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–16. IN RE DISBARMENT OF MADES. It having been reported to this Court that Herbert S. Mades, of Winthrop, Massachusetts, has been suspended from the practice of law in all of the courts of the State of Massachusetts, and this Court by order of November 12, 1973 [*ante*, p. 1019], having suspended the said Herbert S. Mades from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response thereto has been filed;

It is ordered that the said Herbert S. Mades be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 72–1490. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.; and

No. 72–1491. DOUGHERTY, EXECUTOR, ET AL. *v.* TEXACO INC. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 817.] Motion of respondent Interstate Natural Gas Association of America for divided argument granted.

No. 72–1597. BEASLEY ET AL. *v.* FOOD FAIR OF NORTH CAROLINA, INC., ET AL. Sup. Ct. N. C. [Certiorari granted, *ante*, p. 907.] Motion of Associated Industries, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 73–298. VELA ET AL. *v.* VOWELL, COMMISSIONER OF PUBLIC WELFARE OF TEXAS, ET AL. Appeal from D. C. W. D. Tex. Motion of appellants to dispense with printing jurisdictional statement denied with leave to file a printed jurisdictional statement in conformity with Rule 39 of the Rules of this Court, or, if applicable, file

a motion for leave to proceed *in forma pauperis*, with supporting affidavits, pursuant to Rule 53 of the Rules of this Court, on or before February 11, 1974.

No. 73–434. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 73–435. ALLEN PARK PUBLIC SCHOOLS ET AL. *v.* BRADLEY ET AL.; and

No. 73–436. GROSSE POINTE PUBLIC SCHOOL SYSTEM *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1038.] Motion of Metropolitan School Districts of Lawrence Township et al., Marion County, Indiana, for leave to file a brief as *amici curiae* granted.

No. 73–547. GUERRA *v.* TEXAS. Ct. Crim. App. Tex.;

No. 73–697. GETTELMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir.;

No. 73–732. SUTTER *v.* UNITED STATES. C. A. 9th Cir.; and

No. 73–891. PURIN, AKA MOREIRA *v.* UNITED STATES. C. A. 2d Cir. Motions to dispense with printing petitions denied with leave to file printed petitions in each of these cases in conformity with Rule 39 of the Rules of this Court on or before February 11, 1974.

No. 73–662. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* COUNCILMAN. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1111.] Motion for leave to proceed on original record granted.

No. 73–5409. CARTER *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 73–918. PELL ET AL. *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Case consolidated with No.

73–754 [*Procunier, Corrections Director, et al.* v. *Hillery et al.*, probable jurisdiction noted, *ante*, p. 1127] and a total of one hour allotted for oral argument. Reported below: 364 F. Supp. 196.

Certiorari Granted

No. 73–375. OTTE, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 480 F. 2d 184.

No. 73–690. AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP. Ct. App. Colo. Certiorari granted. Reported below: 510 P. 2d 907.

No. 73–781. SCHERK *v.* ALBERTO-CULVER CO. C. A. 7th Cir. Certiorari granted. Reported below: 484 F. 2d 611.

No. 73–804. BAKER ET AL., TRUSTEES IN REORGANIZATION *v.* GOLD SEAL LIQUORS, INC. C. A. 7th Cir. Certiorari granted. Reported below: 484 F. 2d 950.

No. 73–556. FLORIDA POWER & LIGHT CO. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.; and

No. 73–795. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 159 U. S. App. D. C. 272, 487 F. 2d 1143.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* MCDONNELL. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 483 F. 2d 1059.

No. 73–841. HOLDER, U. S. DISTRICT JUDGE *v.* BANKS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted.

No. 73–846. WINGO, WARDEN *v.* WEDDING. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 483 F. 2d 1131.

Certiorari Denied. (See also Nos. 73–5359 and 73–5675, *supra.*)

No. 73–405. MCARTHUR *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–494. INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 155 U. S. App. D. C. 281, 447 F. 2d 450.

No. 73–500. NEWTON ET UX. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 272 So. 2d 15.

No. 73–592. GUIDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 481 F. 2d 1406.

No. 73–600. RUSSO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 480 F. 2d 1228.

No. 73–605. BOBROW *v.* MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–606. LANGLEY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–610. CADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 73–758. VROOM *v.* IRWIN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 481 F. 2d 34.

No. 73–791. GOLDEN TRIANGLE BROADCASTING, INC. *v.* FIELD. Sup. Ct. Pa. Certiorari denied. Reported below: 451 Pa. 410, 305 A. 2d 689.

No. 73–796. UNITED STATES *v.* GRAY. C. A. 6th Cir. Certiorari denied. Reported below: 484 F. 2d 352.

No. 73–800. HERSKOWITZ *v.* HERSKOWITZ. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 281 So. 2d 595.

No. 73–808. MILLER *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 481 F. 2d 1405.

No. 73–814. HOOPES *v.* STATE TAX COMMISSION OF UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 30 Utah 2d 107, 514 P. 2d 221.

No. 73–823. WALKER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 293 N. E. 2d 35.

No. 73–825. AMERICAN HOME PRODUCTS CORP. *v.* LOCKWOOD MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. Reported below: 483 F. 2d 1120.

No. 73–834. OGDEN CORP. ET AL. *v.* LURIA STEEL & TRADING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 484 F. 2d 1016.

No. 73–843. LYKES BROTHERS STEAMSHIP CO., INC. *v.* BROWN. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 61.

No. 73–845. MCDONALD, MAYOR OF EVANSVILLE, ET AL. *v.* MILLER ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 297 N. E. 2d 826.

No. 73–887. HOLDREGE COOPERATIVE EQUITY EXCHANGE *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD. C. A. 8th Cir. Certiorari denied. Reported below: 483 F. 2d 29.

No. 73–5339. CHARLES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 754.

No. 73–5439. HART *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–5451. TORRIENTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5459. TAYLOR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–5462. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied.

No. 73–5487. PRICE ET AL. *v.* UNITED STATES; and
No. 73–5540. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 1167.

No. 73–5510. HERSHIPS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5514. RAMSEY *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–5530. ALLEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 231 Ga. 17, 200 S. E. 2d 106.

No. 73–5545. REED *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–5550. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–5551. SULLIVAN *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–5552. SHUMAKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5556. HARVEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 448.

No. 73–5568. DENNIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 73–5587. HUDSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 73–5600. PETERSON *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 73–5604. WRAGGS *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 496 S. W. 2d 38.

No. 73–5608. KROLL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 478 F. 2d 1401.

No. 73–5609. MARTIN *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied. Reported below: 18 Md. App. 505, 308 A. 2d 212.

No. 73–5647. BOTHELL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 1013.

No. 73–5680. GRCICH *v.* ADMINISTRATOR OF VETERANS' AFFAIRS. C. A. D. C. Cir. Certiorari denied.

No. 73–5682. SEASHOLTZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5687. CUNNINGHAM *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 480 F. 2d 922.

No. 73–5715. PERRY *v.* DIRECTOR, NASA-LEWIS RESEARCH CENTER, ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–5802. CARMICHAEL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 35 Ohio St. 2d 1, 298 N. E. 2d 568.

No. 73–5805. BOAG *v.* CRAVEN, WARDEN; and
No. 73–5834. BOAG *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–5809. MEMS *v.* BLACKLEDGE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–5810. LAMPKIN *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 73–5811. FINLEY *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–5817. MILBURN *v.* VINCENT. C. A. 2d Cir. Certiorari denied.

No. 73–5818. HARRIS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 19 N. C. App. 48, 198 S. E. 2d 108.

No. 73–5822. FIELDS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 73–5823. ACUNA *v.* STONE. C. A. 9th Cir. Certiorari denied.

No. 73–5829. LOMBARDI *v.* TUBMAN, DEPUTY WARDEN. C. A. 2d Cir. Certiorari denied.

No. 73–5833. MOFFETT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 291 Ala. 382, 281 So. 2d 630.

No. 73–5852. WEISS *v.* BURR, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 973.

No. 73–5906. PARKS *v.* REGAN, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 72–1649. WESTERBERG *v.* DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Colo. ——, 506 P. 2d 746.

No. 72–5539. MACIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1292.

No. 72–6744. TURNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6952. SIMMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–393. TAGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 479 F. 2d 120.

No. 73–505. BETTA ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–802. LUCK ET AL. *v.* UNION OIL COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–811. SELB MANUFACTURING CO., A DIVISION OF WESTERN, INC., ET AL. *v.* GENERAL DYNAMICS CORP. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 1204.

No. 73–852. JABLON *v.* TRUSTEES OF CALIFORNIA STATE COLLEGES ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 482 F. 2d 997.

No. 73–5397. JONES *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–5484. HOOKS *v.* ROBERTS, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 1196.

No. 73–5849. MANNING *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1694. NEW YORK *v.* NEWMAN. Ct. App. N. Y. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 32 N. Y. 2d 379, 298 N. E. 2d 651.

No. 73–401. MITCHELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. Reported below: 494 S. W. 2d 865.

No. 73–488. MCMULLEN *v.* VIRGINIA. Sup. Ct. Va. Motion of respondent to dispense with printing brief in opposition and certiorari denied.

No. 73–607. RICHARDSON *v.* IDAHO. Sup. Ct. Idaho. It appearing that petitioner has complied substantially with Rule 39 of the Rules of this Court, motion to dispense with printing petition denied as unnecessary. Certiorari denied. Reported below: 95 Idaho 446, 511 P. 2d 263.

No. 73–649. REYNOLDS *v.* TENNESSEE. Sup. Ct.

Tenn. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the petition.

MR. JUSTICE DOUGLAS, dissenting.

This case involves a demonstration occasioned by the appearance of President Nixon at a week-long Billy Graham East Tennessee Crusade held at a football stadium in Knoxville. The petitioner, an ordained Methodist minister and a professor of religious studies, was convicted under a Tennessee statute which in relevant part proscribes "willfully disturb[ing] or disquiet-[ing] any assemblage of persons met for religious worship . . . by noise, profane discourse, rude or indecent behavior, or any other act." [1] Disruption of the meeting is not an element of the crime under the statute, and the jury was instructed that "if you find from the evidence that the defendants indulged in any indecent or improper conduct, so near the worshipping assembly, if you find that there was a worshipping assembly present on this occasion, as to attract the notice and attention of persons who were present as a part of the assembly—then, under such a state of facts, if they exist, the defendants would be guilty; and this would be so, whether witnesses say they were disturbed or not." (Bill of Exceptions 518.) No evidence was introduced at trial that

[1] "If any person willfully disturb or disquiet any assemblage of persons met for religious worship, or for educational or literary purposes, or as a lodge or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200), and may also be imprisoned not exceeding six (6) months in the county jail." Tenn. Code Ann. § 39–1204 (1955).

The jury imposed a fine of $20 upon petitioner; no prison sentence was imposed.

the meeting was disrupted, in the sense that speakers were shouted down, or that petitioner's group prevented, or sought to prevent, the meeting from proceeding as planned. Nor did the state appellate courts make any such findings in affirming the conviction. Although there were findings that some members of the protest group engaged in obscene chants, it is uncontested that petitioner did not. The undisturbed findings of the State Court of Criminal Appeals were that petitioner "did not chant obscenities and that his intent was for a peaceful demonstration." Petitioner's contentions that the statute was unconstitutionally vague and overbroad were rejected by the state courts.

Petitioner's involvement in the demonstration began the day before when he learned of the President's planned appearance. In consultation with administration officials of the University of Tennessee he participated in planning the demonstration and urged the group to make their protest silently through hand-held signs. On the night of the protest the stadium was filled to capacity with about 75,000 persons; there were approximately 300 demonstrators. Despite earlier plans, the group did engage in a number of chants, and petitioner joined in some of them. The only violence occurring during the evening was the knocking of a collection plate from an usher's hands. Many members of the group, including petitioner, joined in retrieving the money and placing it back in the plate.

Petitioner contends that the part of the meeting relevant to this case—the portion during which Dr. Graham introduced President Nixon, and the President spoke—was political rather than religious. He points out that the platform included prominent state Republican figures but no Democrats and contends that the content of the

President's message was primarily political.[2] We are bound, however, by the state court's determination that for purpose of the state statute the meeting was religious, and that the statute reached petitioner's conduct. We must then consider petitioner's contentions that, given this construction, the statute as applied here was either unconstitutionally vague or overbroad.[3]

The statute in relevant part proscribes "willfully disturb[ing] or disquiet[ing] any assemblage of persons met for religious worship . . . by noise, profane discourse, rude or indecent behavior, or any other act." Since it is uncontested that petitioner did not engage in "profane discourse" or "indecent behavior"[4] the only proscriptions applicable here are those against "noise," "rude behavior" or "any other acts" disturbing the meeting. We have frequently passed upon statutes with similar language. In *Coates* v. *City of Cincinnati,* 402 U. S. 611, we considered an ordinance proscribing assemblies of three or more persons conducting themselves in a manner "annoying" to passersby, and concluded that the term "annoy" without further clarification specified "no standard of conduct . . . at all." *Id.,* at 614. In *Ashton* v. *Kentucky,* 384 U. S. 195, we found fatally vague a criminal prohibition on "writing calculated to create

[2] In addition to President Nixon, the podium included Congressman Brock, a Republican then running for the Senate seat held by Democrat Albert Gore, and Republican Congressmen Kuykendall and Duncan. Bill of Exceptions 348. No prominent Democrats were included.

[3] Neither the court below nor the petition here distinguished between facial and as-applied claims of vagueness or overbreadth.

[4] There was behavior by others in the group which might have fallen within these proscriptions. Among the chants which petitioner did *not* engage in were "Bullshit, bullshit" during the President's speech, and "One, two, three, four, we don't want your fucking war." One isolated member of the group rose during a minister's prayer and screamed an obscenity.

disturbances of the peace" because such a standard "involves calculations as to the boiling point of a particular person or a particular group." *Id.*, at 200. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1.[5]

The addition of "willful" to the statutory prohibition on disturbing the meeting adds no greater precision, since this element of intent is not proved separately but was inferred from the conduct constituting the violation. Indeed, all the direct evidence of petitioner's intent was to the contrary.[6] Nor is the specification of "noise" or "rude behavior" helpful under the facts of this case. We may assume that a State can constitutionally protect religious congregations from unwanted and disruptive intrusions, and it seems probable that men of common intelligence would understand the statute to proscribe organized political chants in the midst of a Sunday morning service at a neighborhood church. But societal norms of appropriate conduct vary with the nature of the meeting in question. Thus what constitutes "rude behavior" or sufficient noise to disturb the assembled group depends upon calculations of the expectations of other members of the group, much as was the case in *Ashton* v. *Kentucky*, *supra*. Cf. *In re Kay*, 1 Cal. 3d 930, 464 P. 2d 142 (1970). This imprecision in the statute is highlighted by the facts of this case.

The meeting in question here was widely advertised and all were invited, and the attendance the night of President Nixon's appearance was apparently considerably above the number present other nights. Thus

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[5] In *Colten* v. *Kentucky*, 407 U. S. 104, the Court affirmed a conviction under a disorderly conduct statute against claims of vagueness and overbreadth. But *Colten*, unlike the present case, did not involve expression protected under the First Amendment, and in *Colten* the petitioner disobeyed a lawful police order to move on.

[6] See Bill of Exceptions 29, 58, 69, 73, 231, 241, 249, 299, 391, 490.

there can be no question that petitioner had a right to be present. Vendors roamed the audience of 75,000 selling refreshments and there was a general noise level created by the crowd throughout the proceedings.[7] People came and went regularly. And at least during the period relevant here—Dr. Graham's introduction and the President's speech—the crowd frequently interrupted the proceedings with applause to indicate their approval of the speaker.[8] It was in this context that the petitioner was required to gauge what conduct would be appropriate, and he made a conscientious effort to do so. Although before the meeting he had argued vigorously for keeping the protest silent, as the content of the speeches became political he joined several chants of the crowd.[9] During Dr. Graham's introduction he joined the chant "Politics, politics" to show his disapproval of what he considered to be a political intrusion into a meeting that was supposed to be religious. And during the President's talk he chanted "Peace now" and "Stop the War." But clearly he considered obscene chants inappropriate, and not only refrained from joining those but spent some effort in attempting to persuade others in the crowd to refrain also. And it must be remembered that during this period others in the crowd were applauding the speakers, and that none of the activities of the petitioner or of his group were violent or disruptive of the meeting in the sense that they prevented it, or sought to prevent it, from proceeding as planned.

[7] *Id.*, at 117.

[8] *Id.*, at 272.

[9] There was evidence that others clearly sympathetic to the Graham religious cause joined the protest because they were offended by the political overtones of this part of the meeting. Two other ministers, who had been converted at previous Graham crusades and who were then attending a Graham training school, testified that they joined in the protest. *Id.*, at 299–320.

Such facts would, of course, present a different case. Here it would seem we have no more than that the petitioner's expression of his views was found disturbing by others.

I find it difficult to conclude that the petitioner was given fair notice under the statute that his conduct was proscribed. Petitioner had to guess not only as to the conduct proscribed by the statute at the meeting in question, but whether the statute applied at all to this portion of the meeting, which could be characterized as political as well as religious. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453. And here, where the statute is capable of interpretation reaching expression protected by the First Amendment, the greatest precision is required. *Ashton* v. *Kentucky,* 384 U. S., at 200–201; *Grayned* v. *City of Rockford,* 408 U. S. 104, 109. Moreover this statute as applied here exhibits the twin defect of inviting "arbitrary and discriminatory enforcement" and of inviting prosecutors and juries to proceed on their prejudices, because of its failure to specify sufficiently what is proscribed. *Grayned, supra,* at 108. Those disturbing the meeting with applause were not prosecuted, although the applause of the much larger group presumably disturbed those in the audience who did not support the President. Thus it appears that the statute allows for arbitrary enforcement on the basis of who is disturbed.

Moreover, because disruption of the meeting is not an element of the offense, the statute poses substantial problems of overbreadth. Under the instructions given by the trial judge, the jury was allowed to convict petitioner for "improper conduct" attracting the notice of persons present. This would appear to sanction conviction by the jury for doing no more than expressing views

unpopular with the assembled crowd, if the jury found that such expression was improper to the occasion, and thus disturbed others. Such a conviction cannot stand under the First Amendment, any more than the conviction in *Terminiello* v. *Chicago*, 337 U. S. 1, where the jury was allowed to convict the defendant for speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." *Id.*, at 4.

The theory under which the intermediate state appellate court affirmed the conviction poses further problems under the First Amendment. Apparently concluding that petitioner did nothing at the meeting itself which was violative of the statute, the State Court of Criminal Appeals sustained the conviction on the theory that petitioner was an aider and abettor because he "admits to protesting the appearance of the President, and he admits to participating in the organizing of the protest." On this basis the court held that "the obscenities from the group and the chanting by the group . . . are also [petitioner's] acts by his participation in the group." The court concluded that petitioner "cannot escape responsibility for his participation in planning the demonstation by relating he personally himself did not do the unlawful acts, which arose during the event." The State Supreme Court, in affirming, rejected the aider-and-abettor reasoning of the lower court because under state law there can be no conviction for aiding and abetting a misdemeanor. The conviction was affirmed, however, because "the conduct of [petitioner] cited by the Court of Criminal Appeals as amounting to aiding and abetting, actually makes [petitioner] guilty as a principal offender." This is followed by citations to state court decisions holding that as to misdemeanors evidence showing aiding and abetting supports conviction as a principal. It thus appears

that petitioner's conviction was affirmed because of his association with other members of the group whose behavior was found violative of the statute.

By grounding petitioner's conviction on his participation in the planning of the protest the state appellate courts place criminal liability on freedom of expression in its most pristine form. Petitioner's role was not contested. He attended the meetings and voiced his approval of some form of protest against the President's appearance, but it appears that at virtually every opportunity he urged the group to keep its protest peaceful and silent. He cannot be held liable because some members of the group chose to express their views in an illegal manner, *United States* v. *Robel,* 389 U. S. 258, particularly when, as here, there is no evidence that the group ever agreed to conduct its protest unlawfully or that petitioner ever acquiesced in such a decision.[10] Nor was petitioner charged with conspiracy.

I would grant the petition for certiorari.

No. 73–661. GOSS ET AL. *v.* BOARD OF EDUCATION OF CITY OF KNOXVILLE, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 482 F. 2d 1044.

No. 73–698. FRIENDS OF THE EARTH ET AL. *v.* STAMM, COMMISSIONER, BUREAU OF RECLAMATION, ET AL. C. A. 10th Cir. Motion of Sierra Club et al. for leave to file

[10] There was evidence that at least one member of the group announced at the meetings that he would not remain silent during the President's speech, but other evidence showed that the group consensus at these meetings was for a silent protest. I do not see how petitioner's right to attend the Graham Crusade could be curtailed because one member of the protest group declined to follow his advice to remain silent.

a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 485 F. 2d 1.

No. 73–707. SCHOOL BOARD OF THE CITY OF DANVILLE, VIRGINIA, ET AL. *v.* MEDLEY ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 482 F. 2d 1061.

Rehearing Denied

No. 72–1541. SCHOOL DISTRICT OF THE CITY OF FERNDALE, MICHIGAN *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 824;

No. 73–336. CATOOR ET AL. *v.* BLAIR ET AL., *ante*, p. 990;

No. 73–474. SMITH *v.* ROBINSON, WARDEN, ET AL., *ante*, p. 1066;

No. 73–5191. FANNING ET AL. *v.* UNITED STATES, *ante*, p. 1006;

No. 73–5248. PALMER *v.* UNITED STATES, *ante*, p. 1008;

No. 73–5278. MASELLI *v.* UNITED STATES, *ante*, p. 1070;

No. 73–5468. COOPER *v.* TEXAS BOARD OF MEDICAL EXAMINERS, *ante*, p. 1072;

No. 73–5576. CASPERSON *v.* PENNSYLVANIA, *ante*, p. 1074; and

No. 73–5614. TARLTON *v.* TEXAS, *ante*, p. 1096. Petitions for rehearing denied.

No. 73–5236. BARGAR *v.* OHIO CIVIL RIGHTS COMMISSION ET AL., *ante*, p. 978; and

No. 73–5358. FONTANA *v.* STATE ROADS COMMISSION OF MARYLAND ET AL., *ante*, p. 1027. Motions for leave to file petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the weeks of May 27 and June 3, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 523-910

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1173 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM JULY 19, 1973, THROUGH OCTOBER 26, 1973

EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN

ON APPLICATION FOR STAY

No. A-51(72-1410). Decided July 19, 1973

Application for stay of mandate and judgment, holding certain procedures of the Illinois Department of Public Aid inconsistent with Department of Health, Education, and Welfare regulations, pending this Court's action on writ of certiorari granted June 11, 1973, denied as to those portions of judgment that apply prospectively only and granted as to paragraphs 5 and 6 thereof. If paragraph 5, directing that lump-sum payments be made retroactively to welfare applicants, is not stayed, petitioner would likely be unable to recover funds paid out, but respondent recipient would be able, if he prevails, to collect all back payments found to be due. The District Judge thought paragraph 6 could be complied with in a period of 15 days, and given the length of time already consumed by appellate review in this case, the addition of two weeks following this Court's decision is not of controlling significance in deciding the application for stay.

See: 472 F. 2d 985.

MR. JUSTICE REHNQUIST, Circuit Justice.

Application has been made to me by petitioner Edelman to stay the mandate and judgment of the Court of Appeals for the Seventh Circuit pending review of that judgment by this Court on writ of certiorari. Certiorari was granted on June 11, 1973, 412 U. S. 937, and therefore the critical question present in most stay applications—whether or not four Justices of this Court would vote to grant certiorari—is here already resolved. The judgment

which is to be reviewed affirmed a District Court judgment holding certain procedures of the Illinois Department of Public Aid to be inconsistent with regulations promulgated by the Department of Health, Education, and Welfare, and therefore invalid to the extent that the State was receiving federal funds for this particular welfare program. Portions of the District Court's judgment, entered on March 15, 1972, are in their application prospective only, but paragraph 5 directs that lump-sum payments be made retroactively to applicants who, in the view of the District Court and of the Court of Appeals, should have received benefits but did not because of the Illinois procedures held invalid. Paragraph 6 of the judgment directs that petitioner's predecessor within 15 days from its date submit to the Court a detailed statement as to the method for effectuating the relief required by paragraph 5.

I seriously doubt whether certiorari would have been granted in this case had it not been for the presence of paragraphs 5 and 6 in the judgment of the District Court. While the entire judgment will be before this Court for review, I am inclined to think that four Justices of this Court would not have voted to grant certiorari to review those portions of the judgment which are in their effect prospective only. I therefore deny the application for the stay of the mandate and judgment of the Court of Appeals as to those portions of the District Court's judgment other than paragraphs 5 and 6.

Insofar as paragraphs 5 and 6 of the judgment are concerned, the decision of the Court of Appeals for the Seventh Circuit in this case conflicts with a judgment of the Court of Appeals for the Second Circuit in *Rothstein* v. *Wyman*, 467 F. 2d 226 (1972). If paragraph 5 of the judgment is not stayed, I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out under

that paragraph to respondent welfare recipient and members of the class he represents. Respondent, on the other hand, will be able to collect from petitioner all of the back payments found due under paragraph 5 should he prevail. A substantial legal question being present, these equities lead me to conclude that paragraph 5 should be stayed.

Respondent argues that even though paragraph 5 be stayed, paragraph 6 should be left in effect pending review here. The late Judge Napoli, however, in framing paragraph 6 apparently thought that it could be complied with in a period of 15 days; given the length of time already consumed by appellate review in this case, the addition of another two weeks following a conclusion by this Court favorable to respondent is not a matter of controlling significance in deciding the application for the stay. It is also conceivable that paragraph 5 of the judgment, with its detailed specifications as to dates, might be modified by this Court on appeal. Thus the procedures developed under paragraph 6 might prove to be entirely useless, and a new set of procedures necessitated, not only on the hypothesis of outright reversal by this Court, but on the hypothesis of modification and affirmance.

On the basis of the foregoing considerations, an order will be entered staying paragraphs 5 and 6 of the judgment of the District Court in this case until further order of this Court.

HOLTZMAN ET AL. *v.* SCHLESINGER ET AL.

ON APPLICATION TO VACATE STAY

No. A–150. Decided August 1, 1973

Application to vacate stay of Court of Appeals' order staying District Court's permanent injunction prohibiting respondent Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia" is denied, as MR. JUSTICE MARSHALL cannot say, in light of the complexity and importance of the issues posed, that the Court of Appeals abused its discretion. The highly controversial constitutional question involving the two other branches of the Government should follow the regular appellate procedures on the accelerated schedule suggested by the Court of Appeals.

MR. JUSTICE MARSHALL, Circuit Justice.

This case is before me on an application to vacate a stay entered by a three-judge panel of the United States Court of Appeals for the Second Circuit. Applicants, a Congresswoman from New York and several Air Force officers serving in Asia, brought this action to enjoin continued United States air operations over Cambodia. They argue that such military activity has not been authorized by Congress and that, absent such authorization, it violates Art. I, § 8, cl. 11, of the Constitution.[1] The United States District Court agreed and, on applicants' motion for summary judgment, permanently enjoined respondents, the Secretary of Defense, the Acting Secretary of the Air Force, and the Deputy Secretary of Defense, from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." However, the effective date of the injunction was delayed until July 27, 1973, in order to

[1] Article I, § 8, cl. 11, provides: "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

give respondents an opportunity to apply to the Court of Appeals for a stay pending appeal. Respondents promptly applied for such a stay, and the application was granted, without opinion, on July 27.[2] Applicants then filed this motion to vacate the stay. For the reasons stated below, I am unable to say that the Court of Appeals abused its discretion in staying the District Court's order. In view of the complexity and importance of the issues involved and the absence of authoritative precedent, it would be inappropriate for me, acting as a single Circuit Justice, to vacate the order of the Court of Appeals.

I

Since the facts of this dispute are on the public record and have been exhaustively canvassed in the District Court's opinion, it would serve no purpose to repeat them in detail here. It suffices to note that publicly acknowledged United States involvement in the Cambodian hostilities began with the President's announcement on April 30, 1970,[3] that this country was launching attacks "to clean out major enemy sanctuaries on

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[2] At the same time, the Court of Appeals ordered an expedited briefing schedule and directed that the appeal be heard on August 13. In the course of oral argument on the stay, Acting Chief Judge Feinberg noted that either side could submit a motion to further advance the date of argument. Counsel for applicants indicated during argument before me that he intends to file such a motion promptly. Moreover, the Solicitor General has made representations that respondents will not oppose the motion and that, if it is granted, the case could be heard by the middle of next week. This case poses issues of the highest importance, and it is, of course, in the public interest that those issues be resolved as expeditiously as possible.

[3] It appears, however, that covert American activity substantially predated the President's April 30 announcement. See, *e. g.*, the New York Times, July 15, 1973, p. 1, col. 1 ("Cambodian Raids Reported Hidden before '70 Foray").

the Cambodian-Vietnam border,"[4] and that American military action in that country has since met with gradually increasing congressional resistance.

Although United States ground troops had been withdrawn from the Cambodian theater by June 30, 1970, in the summer of that year Congress enacted the so-called Fulbright Proviso prohibiting the use of funds for military support of Cambodia.[5] The following winter, Congress re-enacted the same limitation with the added proviso that "nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U. S. Forces from Southeast Asia, or to aid in the release of Americans held as prisoners of war." 84 Stat. 2037. These provisions have been attached to every subsequent military appropriations act.[6] Moreover, in the Special Foreign Assistance Act of 1971, Congress prohibited the use of funds to support American ground combat troops in Cambodia under any circumstances and expressly provided that "[m]ilitary and economic assistance provided by the United States to Cambodia . . . shall not be construed as a commitment by the United States to Cambodia for its defense."[7]

Congressional efforts to end American air activities in Cambodia intensified after the withdrawal of American ground troops from Vietnam and the return of American prisoners of war. On May 10, 1973, the House of Rep-

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[4] The Situation in Southeast Asia, 6 Presidential Documents 596, 598 (1970).

[5] The Fulbright Proviso states:

"Nothing [herein] shall be construed as authorizing the use of any such funds to support Vietnamese or other free world forces in actions designed to provide military support and assistance to the Government of Cambodia or Laos." 84 Stat. 910.

[6] See 85 Stat. 423; 85 Stat. 716; 86 Stat. 734; 86 Stat. 1184.

[7] 84 Stat. 1943. See also 22 U. S. C. § 2416 (g) (1970 ed., Supp. II).

resentatives refused an administration request to authorize the transfer of $175 million to cover the costs of the Cambodian bombing. See 119 Cong. Rec. 15291, 15317–15318 (1973). Shortly thereafter, both Houses of Congress adopted the so-called Eagleton Amendment prohibiting the use of any funds for Cambodian combat operations.[8] 119 Cong. Rec. 17693, 21173. Although this provision was vetoed by the President, an amendment to the Continuing Appropriations Resolution was ultimately adopted and signed by the President into law which stated:

> "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." H. J. Res. 636, The Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. 93–52,[9] § 108, 87 Stat. 134.

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[8] The Eagleton Amendment provided:

"None of the funds herein appropriated under this Act or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces." 119 Cong. 17124 (1973).

[9] The President contemporaneously signed the Second Supplemental Appropriations Act, 1973, Pub. L. 93–50, which contained a provision, § 307, 87 Stat. 129, stating that

"[n]one of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

II

Against this background, applicants forcefully contend that continued United States military activity in Cambodia is illegal. Specifically, they argue that the President is constitutionally disabled in nonemergency situations from exercising the warmaking power in the absence of some affirmative action by Congress. See, *e. g., Bas* v. *Tingy,* 4 Dall. 37 (1800); *Talbot* v. *Seeman,* 1 Cranch 1 (1801); *Mitchell* v. *Laird,* 159 U. S. App. D. C. 344, 348, 488 F. 2d 611, 615 (1973); *Orlando* v. *Laird,* 443 F. 2d 1039, 1042 (CA2 1971). Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952). In light of the Fulbright Proviso, applicants take the position that Congress has never given its assent for military activity in Cambodia once American ground troops and prisoners of war were extricated from Vietnam.

With the case in this posture, however, it is not for me to resolve definitively the validity of applicants' legal claims. Rather, the only issue now ripe for decision is whether the stay ordered by the Court of Appeals should be vacated. There is, to be sure, no doubt that I have the power, as a single Circuit Justice, to dissolve the stay. See *Meredith* v. *Fair,* 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., Circuit Justice); 28 U. S. C. §§ 1651, 2101 (f). But at the same time, the cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances. Cf. *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 409 U. S. 1207, 1218 (1972) (BURGER, C. J., Circuit Justice).

Unfortunately, once these broad propositions are recognized, the prior cases offer little assistance in resolving this issue, which is largely *sui generis.* There are, of course, many cases suggesting that a Circuit Justice should "balance the equities" when ruling on stay ap-

plications and determine on which side the risk of irreparable injury weighs most heavily. See, *e. g.*, *Long Beach Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank*, 76 S. Ct. 32, 100 L. Ed. 1517 (1955) (DOUGLAS, J., Circuit Justice); *Board of Education* v. *Taylor*, 82 S. Ct. 10 (1961) (BRENNAN, J., Circuit Justice); *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 3, 21 L. Ed. 2d 72 (1968) (STEWART, J., Circuit Justice).

But in this case, the problems inherent in attempting to strike an equitable balance between the parties are virtually insurmountable. On the one hand, applicants assert that if the stay is not vacated, the lives of thousands of Americans and Cambodians will be endangered by the Executive's arguably unconstitutional conduct. Applicants argue, not implausibly, that if the stay is not vacated, American pilots will be killed or captured, Cambodian civilians will be made refugees, and the property of innocent bystanders will be destroyed.

Yet, on the other hand, respondents argue that if the bombing is summarily halted, important foreign policy goals of our Government will be severely hampered. Some may greet with considerable skepticism the claim that vital security interests of our country rest on whether the Air Force is permitted to continue bombing for a few more days, particularly in light of respondents' failure to produce affidavits from any responsible Government official asserting that such irreparable injury will occur.[10] But it cannot be denied that the assessment of such injury poses the most sensitive of problems, about which Justices of this Court have little or no information or expertise. While we have undoubted authority to judge

[10] While respondents offered to produce testimony at trial by high Government officials as to the importance of the bombing, no affidavits by such officials alleging irreparable injury in conjunction with the stay application were offered.

the legality of executive action, we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity.[11]

The other standards utilized for determining the propriety of a stay are similarly inconclusive. Opinions by Justices of this Court have frequently stated that lower court decisions should be stayed where it is likely that four Members of this Court would vote to grant a writ of certiorari. See, *e. g., Edwards* v. *New York,* 76 S. Ct. 1058, 1 L. Ed. 2d 17 (1956) (Harlan, J., Circuit Justice); *Appalachian Power Co.* v. *American Institute of C. P. A.,* 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959) (BRENNAN, J., Circuit Justice); *English* v. *Cunningham,* 80 S. Ct. 18, 4 L. Ed. 2d 42 (1959) (Frankfurter, J., Circuit Justice). But to some extent, at least, this standard reflects a desire to maintain the status quo in those cases which the Court is likely to hear on the merits. See, *e. g., In re Bart,* 82 S. Ct. 675, 7 L. Ed. 2d 767 (1962) (Warren, C. J., Circuit Justice); *McGee* v. *Eyman,* 83 S. Ct. 230, 9 L. Ed. 2d 267 (1962) (DOUGLAS, J., Circuit Justice). This case is unusual in that regardless of what action I take, it will likely be impossible to preserve this controversy in its present form for ultimate review by this Court. Cf. *O'Brien* v. *Brown,* 409 U. S. 1, 9–10 (1972) (MARSHALL, J., dissenting). On August 15, the statutory ban on Southeast Asian military activity will take effect, and the contours of this dispute will then be irrevocably altered. Hence, it is difficult to justify a stay for the purpose of preserving the status quo, since no action by this Court can freeze the issues in their present form.[12]

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[11] For similar reasons, it would be a formidable task to judge where the public interest lies in this dispute, as courts traditionally do when determining the appropriateness of a stay. See, *e. g., O'Brien* v. *Brown,* 409 U. S. 1, 3 (1972).

[12] I do not mean to suggest that this dispute will necessarily be moot after August 15. That is a question which is not now before

To some extent, as well, the "four-vote" rule reflects the policy in favor of granting a stay only when the losing party presents substantial contentions which are likely to prevail on the merits. See, *e. g., O'Brien* v. *Brown, supra; Rosenberg* v. *United States,* 346 U. S. 273, 313 (1953) (DOUGLAS, J., Circuit Justice); *Railway Express Agency* v. *United States,* 82 S. Ct. 466, 7 L. Ed. 2d 432 (1962) (Harlan, J., Circuit Justice); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 396 U. S. 1201 (1969) (Black, J., Circuit Justice). In my judgment, applicants' contentions in this case are far from frivolous and may well ultimately prevail. Although tactical decisions as to the conduct of an ongoing war may present political questions which the federal courts lack jurisdiction to decide, see, *e. g., DaCosta* v. *Laird,* 471 F. 2d 1146 (CA2 1973), and although the courts may lack the power to dictate the form which congressional assent to warmaking must take, see, *e. g., Massachusetts* v. *Laird,* 451 F. 2d 26 (CA1 1971); *Mitchell* v. *Laird,* 159 U. S. App. D. C. 344, 488 F. 2d 611 (1973), there is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially manageable standards as to congressional authorization for warmaking, and that these standards are sufficient to make controversies concerning them justiciable. See *Mitchell* v. *Laird, supra; DaCosta* v. *Laird, supra; Orlando* v. *Laird,* 443 F. 2d 1039 (CA2 1971); *Berk* v. *Laird,* 429 F. 2d 302 (CA2 1970).

Similarly, as a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps, in the case of a pressing emergency or when

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me and upon which I express no views. Moreover, even if the August 15 fund cutoff does moot this controversy, applicants may nonetheless be able to secure a Court of Appeals determination on the merits before August 15. See n. 2, *supra.*

the President is in the process of extricating himself from a war which Congress once authorized. At the very beginning of our history, Mr. Chief Justice Marshall wrote for a unanimous Court that:

> "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied . . . that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." *Talbot* v. *Seeman,* 1 Cranch 1, 28 (1801).

In my judgment, nothing in the 172 years since those words were written alters that fundamental constitutional postulate. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952).

A fair reading of Congress' actions concerning the war in Cambodia may well indicate that the Legislature has authorized only "partial hostilities"—that it has never given its approval to the war except to the extent that it was necessary to extricate American troops and prisoners from Vietnam. Certainly, this seems to be the thrust of the Fulbright Proviso.[13] Moreover, this Court

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[13] The Solicitor General vigorously argues that by directing that Cambodian operations cease on August 15, Congress implicitly authorized their continuation until that date. But while the issue is not wholly free from doubt, it seems relatively plain from the face of the statute that Congress directed its attention solely to military actions after August 15, while expressing no view on the propriety of ongoing operations prior to that date. This conclusion gains plausibility from the remarks of the sponsor of the provision—Senator Fulbright—on the Senate floor:

"The acceptance of an August 15 cutoff date should in no way be interpreted as recognition by the committee of the President's

could easily conclude that after the Paris Peace Accords, the Cambodian bombing is no longer justifiable as an extension of the war which Congress did authorize and that the bombing is not required by the type of pressing emergency which necessitates immediate presidential response.

Thus, if the decision were mine alone, I might well conclude on the merits that continued American military operations in Cambodia are unconstitutional. But the Supreme Court is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices. It follows that when I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court, from whence my ultimate authority in these matters derives. A Circuit Justice therefore bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them, cf. *Meredith* v. *Fair*, 83 S. Ct. 10, 11, 9 L. Ed. 2d 43, 44–45 (1962) (Black, J., Circuit Justice), and this responsibility is particularly pressing when, as now, the Court is not in session.

When the problem is viewed from this perspective, it is immeasurably complicated. It must be recognized that we are writing on an almost entirely clean slate in this area. The stark fact is that although there have

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authority to engage U. S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval." 119 Cong. Rec. 22305 (1973). See also *id.*, at 22307.

While it is true that some Senators declined to vote for the proposal because of their view that it did implicitly authorize continuation of the war until August 15, see *id.*, at 22313 (remarks of Sen. Eagleton); 22309 (remarks of Sen. Bayh); 22317 (remarks of Sen. Muskie), it is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question.

been numerous lower court decisions concerning the legality of the war in Southeast Asia, this Court has never considered the problem, and it cannot be doubted that the issues posed are immensely important and complex. The problem is further complicated by the July 1, 1973, amendment to the Continuing Appropriations Resolution providing that "on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." 87 Stat. 134. This, it is urged, is the crux of this case and there is neither precedent nor guidelines toward any definitive conclusion as to whether this is or is not sufficient to order the bombings to be halted prior to August 15.

Lurking in this suit are questions of standing, judicial competence, and substantive constitutional law which go to the roots of the division of power in a constitutional democracy. These are the sort of issues which should not be decided precipitately or without the benefit of proper consultation. It should be noted, moreover, that since the stay below was granted in respondents' favor, the issue here is not whether there is some possibility that applicants will prevail on the merits, but rather whether there is some possibility that respondents will so prevail. In light of the uncharted and complex nature of the problem, I am unwilling to say that that possibility is nonexistent.

Finally, it is significant that although I cannot know with certainty what conclusion my Brethren would reach, I do have the views of a distinguished panel of the Court of Appeals before me. That panel carefully considered the issues presented and unanimously concluded that a stay was appropriate. Its decision, taken in aid of its own jurisdiction, is entitled to great weight. See, *e. g.*,

United States ex rel. Knauff v. *McGrath* (unreported opinion reprinted at 96 Cong. Rec. App. 3751 (1950)) (Jackson, J., Circuit Justice); *Breswick & Co.* v. *United States,* 75 S. Ct. 912, 100 L. Ed. 1510 (1955) (Harlan, J., Circuit Justice). In light of the complexity and importance of the issues posed, I cannot say that the Court of Appeals abused its discretion.

When the final history of the Cambodian war is written, it is unlikely to make pleasant reading. The decision to send American troops "to distant lands to die of foreign fevers and foreign shot and shell," *New York Times Co.* v. *United States,* 403 U. S. 713, 717 (1971) (Black, J., concurring), may ultimately be adjudged to have been not only unwise but also unlawful.

But the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws. Down that road lies tyranny and repression. We have a government of limited powers, and those limits pertain to the Justices of this Court as well as to Congress and the Executive. Our Constitution assures that the law will ultimately prevail, but it also requires that the law be applied in accordance with lawful procedures.

In staying the judgment of the District Court, the Court of Appeals agreed to hear the appeal on its merits on August 13 and advised applicants to apply to that panel for an earlier hearing before that date. It is, therefore, clear to me that this highly controversial constitutional question involving the other two branches of this Government must follow the regular appellate procedures on the accelerated schedule as suggested by the Court of Appeals.

In my judgment, I would exceed my legal authority were I, acting alone, to grant this application. The application to vacate the stay entered below must therefore be

Denied.

HOLTZMAN ET AL. *v.* SCHLESINGER ET AL.

ON REAPPLICATION TO VACATE STAY

No. A–150. Decided August 4, 1973*

Application to vacate Court of Appeals' order staying District Court's permanent injunction prohibiting respondent Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," denied by MR. JUSTICE MARSHALL, *ante*, p. 1304, is granted, as MR. JUSTICE DOUGLAS believes the merits of the controversy are substantial and that denial of the application would catapult American airmen and Cambodian peasants into a death zone. The case is treated as a capital case, and the stay entered by the Court of Appeals is vacated and the order of the District Court is reinstated.

MR. JUSTICE DOUGLAS, Circuit Justice.

My Brother MARSHALL, after a hearing, denied this application which in effect means that the decision of the District Court holding that the bombing of Cambodia is unconstitutional is stayed pending hearing on the merits before the Court of Appeals.

An application for stay denied by one Justice may be made to another. We do not, however, encourage the practice; and when the Term starts, the Justices all being in Washington, D. C., the practice is to refer the second application to the entire Court. That is the desirable practice to discourage "shopping around."

When the Court is in recess that practice cannot be followed, for the Justices are scattered. Yakima, Washington, where I have scheduled the hearing, is nearly 3,000 miles from Washington, D. C. Group action by all Members is therefore impossible.

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*[REPORTER'S NOTE: This opinion was released on August 4, 1973. MR. JUSTICE DOUGLAS' order in this case was issued August 3, 1973.]

I approached this decision, however, with deliberation, realizing that, while the judgment of my Brother MARSHALL is not binding on me, it is one to which I pay the greatest deference.

My Brother MARSHALL accurately points out that if the foreign policy goals of this Government are to be weighed the Judiciary is probably the least qualified branch to weigh them. He also states that if stays by judicial officers in cases of this kind are to be vacated the circumstances must be "exceptional." I agree with those premises, and I respect the views of those who share my Brother MARSHALL'S predilections.

But this case in its stark realities involves the grim consequences of a capital case. The classic capital case is whether Mr. Lew, Mr. Low, or Mr. Lucas should die. The present case involves whether Mr. X (an unknown person or persons) should die. No one knows who they are. They may be Cambodian farmers whose only "sin" is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Or Mr. X may be the American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know that someone is about to die.

Since that is true I see no reason to balance the equities and consider the harm to our foreign policy if one or a thousand more bombs do not drop. The reason is that we live under the Constitution and in Art. I, § 8, cl. 11, it gives to Congress the power to "declare War." The basic question on the merits is whether Congress, within the meaning of Art. I, § 8, cl. 11, has "declared war" in Cambodia.

It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress.

The Court in the *Prize Cases* said:

> "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole Executive power. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . .
>
> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." 2 Black 635, 668.

The question of justiciability does not seem substantial. In the *Prize Cases*, decided in 1863, the Court entertained a complaint involving the constitutionality of the Civil War. In my time we held that President Truman in the undeclared Korean war had no power to seize the steel mills in order to increase war production. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. The *Prize Cases* and the *Youngstown* case involved the seizure of property. But the Government conceded on oral argument that property is no more important than life under our Constitution. Our Fifth Amendment which curtails federal power under the Due Process Clause protects "life, liberty, or property" in that order. Property is important, but if President Truman could not seize it in violation of the Constitution I do not see how any President can take "life" in violation of the Constitution.

As to "standing," which my Brother MARSHALL correctly states is an issue, there seems to be no substantial question that a taxpayer at one time had no standing to complain of the lawless actions of his Government. But that rule has been modified. In *Flast* v. *Cohen*, 392 U. S. 83, 106, the Court held that a taxpayer could invoke

"federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." That case involved alleged violations of the Establishment Clause of the First Amendment. The present case involves Art. I, § 8, cl. 11, which gives Congress and not the President the power to "declare War."

If applicants are correct on the merits they have standing as taxpayers. The case in that posture is in the class of those where standing and the merits are inextricably intertwined. I see no difference, constitutionally speaking, between the standing in *Flast* and the standing in the present case for our Cambodian caper contested as an unconstitutional exercise of presidential power.

When a stay in a capital case is before us, we do not rule on guilt or innocence. A decision on the merits follows and does not precede the stay. If there is doubt whether due process has been followed in the procedures, the stay is granted because death is irrevocable. By the same token I do not sit today to determine whether the bombing of Cambodia is constitutional. Some say it is merely an extension of the "war" in Vietnam, a "war" which the Second Circuit has held in *Berk* v. *Laird,* 429 F. 2d 302, to raise a "political" question, not a justiciable one. I have had serious doubts about the correctness of that decision, but our Court has never passed on the question authoritatively. I have expressed my doubts on the merits in various opinions dissenting from denial of certiorari.† But even if the "war" in Vietnam were

†*Sarnoff* v. *Shultz,* 409 U. S. 929; *DaCosta* v. *Laird,* 405 U. S. 979; *Massachusetts* v. *Laird,* 400 U. S. 886; *McArthur* v. *Clifford,* 393 U. S. 1002; *Hart* v. *United States,* 391 U. S. 956; *Holmes* v. *United States,* 391 U. S. 936; *Mora* v. *McNamara,* 389 U. S. 934, 935; *Mitchell* v. *United States,* 386 U. S. 972.

assumed to be a constitutional one, the Cambodian bombing is quite a different affair. Certainly Congress did not in terms declare war against Cambodia and there is no one so reckless to say that the Cambodian forces are an imminent and perilous threat to our shores. The briefs are replete with references to recent Acts of Congress which, to avoid a presidential veto, were passed to make clear—as I read them—that no bombing of Cambodia was to be financed by appropriated funds after August 15, 1973. Arguably, that is quite different from saying that Congress has declared war in Cambodia for a limited purpose and only up to and not beyond August 15, 1973. If the acts in question are so construed the result would be, as the District Court said, that the number of votes needed to sustain a presidential veto—one-third plus one—would be all that was needed to bring into operation the new and awesome power of a President to declare war. The merits of the present controversy are therefore, to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone. I do what I think any judge would do in a capital case—vacate the stay entered by the Court of Appeals.

It is so ordered.

SCHLESINGER ET AL. *v.* HOLTZMAN ET AL.

ON APPLICATION FOR STAY

No. A–175. Decided August 4, 1973

Application for stay of District Court's order enjoining Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," the only order extant in this litigation in view of MR. JUSTICE DOUGLAS' order vacating Court of Appeals' stay of District Court order, *ante*, p. 1316, granted by MR. JUSTICE MARSHALL, pending further order of this Court. BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., agree with this action.

MR. JUSTICE MARSHALL, Circuit Justice.

On August 1, 1973, I, as Circuit Justice for the Second Circuit, denied an application to vacate a stay entered by the United States Court of Appeals for the Second Circuit on July 27, 1973, staying the order of the District Court for the Eastern District of New York dated July 25, 1973.

On August 2, Elizabeth Holtzman and others, plaintiffs in the original action, presented an application to MR. JUSTICE DOUGLAS. A hearing was then set in Yakima, Washington, on Friday, August 3. On August 3, an order was issued by MR. JUSTICE DOUGLAS vacating the stay entered by the Court of Appeals on July 27, 1973, and thereby reinstating the order of the United States District Court for the Eastern District of New York.

On August 4, the Solicitor General presented an application for a stay of the order of the United States District Court for the Eastern District of New York.

Since the action of the Court of Appeals in granting a stay is set aside, the only order extant in this case is

the order of the District Court dated July 25, 1973. The instant application calls on me to deal directly with that order of the District Court.

In the ordinary course, a Justice acting as a Circuit Justice would defer acting with respect to a District Court order until the Court of Appeals had acted, but in the present circumstances the Court of Appeals has already acted and the consequence of the order of MR. JUSTICE DOUGLAS is to set aside the Court of Appeals order.

The consequence of the Court of Appeals' stay order of August 1, 1973, was to preserve the status quo until it could act on the merits. The Court of Appeals, having originally expedited a hearing on the merits to August 13, 1973, has since further expedited the hearing on the merits to August 8, 1973.

Now therefore, the order of the District Court dated July 25, 1973, is hereby stayed pending further order by this Court.

I have been in communication with the other Members of the Court, and THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST agree with this action.

MR. JUSTICE DOUGLAS, dissenting.

The order I entered August 3, 1973, in *Holtzman* v. *Schlesinger* not only vacated the stay of the Court of Appeals but also reinstated the judgment of the District Court. I mailed it on August 3, 1973, and reported its contents to the Clerk's office. My order of August 3, 1973, reads as follows:

"ORDER

"On application of petitioners and after oral argument it is ordered:

"(1) that the stay of the District Court's order

entered by the Court of Appeals on July 27, 1973 is vacated and

"(2) that the order of the District Court of July 25, 1973 enjoining Defendants from participating in any way in military activities in or over Cambodia or releasing any bombs which may fall on Cambodia is hereby restored.

"W. O. Douglas

"August 3, 1973."

My Brother MARSHALL in his opinion of August 4, 1973, misstates the facts when he says that "the only order extant in this case is the order of the District Court." A correct statement would be that the most recent order in this case was my order of August 3, 1973, reinstating the order of the District Court, which would thus leave the Court of Appeals free to act on the merits and give full relief or, alternatively, permit this Court to reverse me. Under my Brother MARSHALL's order of August 4, 1973, only this Court can act to give injunctive relief.[1]

The Court has unquestioned power to reverse me; and although I disagree with the Court's action on the merits, that is not the point of this dissent. If we who impose law and order are ourselves to be bound by law and order, we can act as a Court only when at least six of us are present. That is the requirement of the Act of Congress; [2] and heretofore it has been the practice to summon the Court to Special Term. Seriatim telephone calls cannot, with all respect, be a lawful substitute. A Con-

[1] The Court takes a bite out of the merits, for the order of August 4, 1973, bars the Court of Appeals from reinstating the judgment of the District Court until and unless this Court acts, as the order states that the order of the District Court "is hereby stayed pending further order by this Court."

[2] "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U. S. C. § 1.

ference brings us all together; views are exchanged; briefs are studied; oral argument by counsel for each side is customarily required. But even without participation the Court always acts in Conference and therefore responsibly.

Those of the Brethren out of Washington, D. C., on August 4, 1973, could not possibly have studied my opinion in this case. For, although I wrote it late on August 3, it was not released until 9:30 a. m. on August 4; and before 3 p. m., August 4, I was advised by telephone that eight Members of the Court disagreed with me. The issue tendered in the case was not frivolous; the Government on oral argument conceded as much. It involved a new point of law never yet resolved by the Court. I have participated for enough years in Conferences to realize that profound changes are made among the Brethren once their minds are allowed to explore a problem in depth. Yet there were only a few of the Brethren who saw my opinion before they took contrary action.

Whatever may be said on the merits, I am firmly convinced that the telephonic disposition of this grave and crucial constitutional issue is not permissible. I do not speak of social propriety. It is a matter of law and order involving high principles. The principles are that the Court is a deliberative body that acts only on reasoned bases after full consideration, and that it is as much bound by the law of the land as is he who lives in the ghetto or in the big white house on the hill. With all respect, I think the Court has slighted that law. The shortcut it has taken today surely flouts an Act of Congress providing for a necessary quorum. A Gallup Poll type of inquiry of widely scattered Justices is, I think, a subversion of the regime under which I thought we lived.

One Justice who grants bail, issues a stay of a mandate, or issues a certificate of probable cause cannot under the

statutory regime designed by Congress vacate, modify, or reverse what another Justice does.[3] The Court, of course, can do so—and only the Court [4]—but when the Court acts it must have six Members present.

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[3] The statutes authorizing individual Justices of this Court to affirmatively grant applications for such actions do not authorize them to rescind affirmative action taken by another Justice. See, *e. g.*, 28 U. S. C. § 2101 (f) (stays of mandate); 28 U. S. C. § 2241 (a) (writs of habeas corpus); 18 U. S. C. § 3141 and Fed. Rule Crim. Proc. 46 (a) (2) (granting of bail).

[4] This requirement of collegial action is confirmed by the Rules of this Court and by this Court's prior decisions and practices.

Rules 50 and 51 govern the in-chambers practices of the Court. Rule 50 (5) provides that, when one Justice denies an application made to him, the party who has made the unsuccessful application may renew it to any other Justice. It was pursuant to this Rule that application for the stay in this case was made to me. But neither Rule 50 nor Rule 51 authorizes a party, once a stay has been granted, to contest that action before another individual Justice.

The Court has previously deemed it necessary and proper to meet together in Special Term before stays granted by an individual Justice out of Term could be overturned. In *Rosenberg* v. *United States*, 346 U. S. 273, the full Court felt constrained to consider its power to vacate a stay issued by an individual Justice, finally resting that power on the Court's position—as a body—as final interpreter of the law:

"We turn next to a consideration of our power to decide, in this proceeding, the question preserved by the stay. It is true that the full Court has made no practice of vacating stays issued by single Justices, although it has entertained motions for such relief. But reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power.

"The power which we exercised in this case derives from this Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay.

. . . . .

". . . [T]he reasons for refusing, as a matter of practice, to vacate stays issued by single Justices are obvious enough. Ordinarily the stays of individual Justices should stand until the grounds upon

Under the law as it is written, the order of MR. JUSTICE MARSHALL of August 4, 1973, will in time be reversed by that Higher Court which invariably sits in judgment on the decisions of this Court. The order of August 4, 1973, in this case would be valid only if we had the power to agree by telephone that the rules framed by Congress to govern our procedures should be altered. We have no such power. What Members of the Court told Brother MARSHALL to do on August 4, 1973, does not, with all respect, conform with our ground rules. It may have been done inadvertently, but it is nonetheless not a lawful order. Therefore, I respectfully dissent.

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which they have issued can be reviewed through regular appellate processes.

"In this case, however, we deemed it proper and necessary to convene the Court to consider the Attorney General's urgent application." *Id.*, at 286–287 (footnote omitted).

Finally, it is our procedure during a Term of Court to take an application that has already been denied or acted upon by one of the Justices to the entire Court upon an application made by the opposing side, so that the entire Court can act and thus prevent "shopping around." That course is not possible during recess when the Justices are scattered around the country and throughout the world. Therefore it has been my practice if I grant a stay during recess to make that stay effective only until the Court convenes in October. This course could not be followed in the instant case because after August 15, 1973, the case will be moot.

EX PARTE HAYES

ON APPLICATION FOR WRIT OF HABEAS CORPUS

No. A-283. Decided October 26, 1973

Habeas corpus application by a serviceman stationed in Germany, alleging that he is being unlawfully retained in the Army, is transferred to the District Court for the District of Columbia pursuant to 28 U. S. C. § 2241 (b), since, although the respondent commanding officer is also in Germany, others in the chain of command, as well as the other named respondents—the Chief of Personnel Actions and the Secretary of the Army—are in the District of Columbia.

MR. JUSTICE DOUGLAS.

This is an application for habeas corpus presented to me.

The applicant is a United States Army private on active duty stationed in Mannheim, Germany. He contends that the Army has failed to fulfill an enlistment commitment made to him and that his continued retention by the Army is therefore in violation of law and army regulations. It is alleged that the applicant's immediate commanding officer, in Mannheim, approved his application for discharge, but that the Chief of Personnel Actions in Washington denied the application. Named as respondents are these two officers and the Secretary of the Army, Howard Calloway.

In making his application here the applicant invokes this Court's original habeas jurisdiction, 28 U. S. C. § 2241, in the belief that jurisdiction in the district court may be questionable because both the applicant and his commanding officer are located in Germany, outside the territorial jurisdiction of any district court. The Solicitor General in response suggests that jurisdiction may be had in the District Court for the District of

Columbia, or alternatively that the application be transferred to that court pursuant to 28 U. S. C. § 2241 (b).[1] I intimate no views on the question or on the merits of applicant's claim.

We have previously upheld the jurisdiction of a district court over a habeas application when the person confined is moved out of the district after the application is filed. *Jones* v. *Cunningham,* 371 U. S. 236 (1963); *Ex parte Endo,* 323 U. S. 283 (1944). In *Ahrens* v. *Clark,* 335 U. S. 188 (1948), we reserved the question now here. *Id.,* at 192 n. 4.

We noted in *Endo, supra,* at 306, that the more fundamental jurisdictional requirement was not the location in the district of the person confined but the presence of the person with custody over the habeas applicant. In *Schlanger* v. *Seamans,* 401 U. S. 487 (1971), we found that the District Court did not have jurisdiction over the habeas application of an Air Force enlisted man because neither his commanding officer nor anyone "in his chain of command" was a resident of the district. *Id.,* at 489. Here, as previously noted, the applicant's commanding officer is in Germany, outside the territorial limits of any district court. But others in the chain of command, as well as both of the other named respondents, are in the District of Columbia.

The District Court for the District of Columbia in *Rothstein* v. *Secretary of the Air Force,* Civil Action No. 1565–73, took jurisdiction in a like case on August 30, 1973. It has been suggested that our prior decisions in *Burns* v. *Wilson,* 346 U. S. 137 (1953), and *Toth* v. *Quarles,* 350 U. S. 11 (1955), decided "sub silentio

[1] "The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

and by fiat, that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia." [2] On that basis I transfer the application to the District Court for the District of Columbia, recognizing, of course, that the District Court has jurisdiction to determine the question of its jurisdiction.

So ordered.

[2] H. Hart & H. Wechsler, The Federal Courts and The Federal System 359 n. 52 (2d ed. 1973).

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CONSTITUTIONAL LAW. See also **Abstention**; **Federal-State Relations**, 1–4, 6; **Judicial Review**, 3; **Jurisdiction**, 5; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

I. Case or Controversy.

1. *Civil rights action—Insufficient allegations.*—The complaint in civil rights action against magistrate and judge alleging illegal bond-setting, sentencing, and jury-fee practices in criminal cases fails to satisfy the threshold requirement of Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy, where none of the named plaintiffs is identified as having himself suffered any injury in the manner specified, the claim alleging injury is in only the most general terms, and there are no allegations that any relevant state criminal statute is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law. O'Shea v. Littleton, p. 488.

2. *Class action—Named plaintiffs.*—If none of named plaintiffs purporting to represent a class meets case-or-controversy requirement, none may seek relief on behalf of himself or any other member of class. O'Shea v. Littleton, p. 488.

3. *Prosecution for violation of valid laws.*—Case-or-controversy requirement is not satisfied by general assertions or inferences that in course of their activities respondents will be prosecuted for violating valid criminal laws. O'Shea v. Littleton, p. 488.

4. *Remote threat of injury.*—Where it can only be speculated whether respondents will be arrested for violating an ordinance or state statute, particularly in absence of allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct, and respondents have not pointed to any imminent prosecutions contemplated against them so that they do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is too remote to satisfy case-or-

CONSTITUTIONAL LAW—Continued.

controversy requirement and permit adjudication by federal court. O'Shea v. Littleton, p. 488.

II. Commerce Clause.

Profit-sharing plan—State wage relief law—Burden on interstate commerce.—Even though petitioner broker-dealer's profit-sharing plan is open to all eligible employees in United States, and respondent account executive's employment and petitioner's business are interstate, the application of California wage relief law would not unduly burden interstate commerce. Merrill Lynch, Pierce, Fenner & Smith, v. Ware, p. 117.

III. Due Process.

1. *Conviction—No evidence of crucial element of offense.*—An independent examination of trial court record pursuant to Supreme Court Rule 40 (1) (d) (2) discloses that evidence is completely lacking that appellant, who had been convicted of "wilfully" contributing to delinquency of a minor, personally sold 14-year-old girl button inscribed "Copulation Not Masturbation" or that he was aware of sale or present in store at the time, a fatal void in State's case that was not filled by appellant's concession at trial that he "controlled the premises" at the time. A conviction based on a record completely lacking any relevant evidence as to a crucial element of offense charged violates due process. Vachon v. New Hampshire, p. 478.

2. *Equal protection—Narcotic Addict Rehabilitation Act of 1966—Two-prior-felony exclusion.*—Title II of NARA does not deny due process or equal protection by excluding from rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions, since Congress could rationally assume that an addict with a multiple-felony record is likely to benefit less from rehabilitative treatment, present a possible impediment to successful treatment of others, and be a greater threat to society upon release, because of that record. Marshall v. United States, p. 417.

3. *Florida criminal statute—Oral and anal sexual activity—Vagueness—Prospective ruling.*—Florida statutory provision proscribing "the abominable and detestable crime against nature, either with mankind or beast . . . ," in light of State Supreme Court's long-standing construction as applying to copulation per os and per anum, *held* not unconstitutionally vague; and that court's later ruling after appellees' convictions for those offenses had become final holding statute void for vagueness as applied to oral and anal sexual activity

CONSTITUTIONAL LAW—Continued.

did not require reversal of appellees' convictions since subsequent ruling was prospective only and at time appellees committed acts they were on clear notice that their conduct was criminal under statute as then construed. Wainwright v. Stone, p. 21.

4. *Fourteenth Amendment—Pharmacy permit statute.*—North Dakota statutory requirements for permitting operation of pharmacy do not violate Due Process Clause of Fourteenth Amendment. In enacting challenged legislation State was well within its authority "to legislate against what [it] found to be injurious practices in [its] internal commercial and business affairs," and this Court will not substitute its own judgment for what State feels is reasonably necessary to protect interests of public. North Dakota Pharmacy Bd. v. Snyder's Stores, p. 156.

5. *Fourteenth Amendment—"Presumption of truthfulness" instruction.*—A "presumption of truthfulness" instruction given to jury at an Oregon criminal trial cannot be considered in isolation and when viewed, as it must be, in context of overall charge, in which trial court twice gave explicit instructions affirming presumption of innocence and declaring State's obligation to prove guilt beyond a reasonable doubt, did not so infect entire trial that resulting conviction violated requirements of Due Process Clause of Fourteenth Amendment, challenged instruction neither having shifted burden of proof to defendant nor negated presumption of innocence accorded under state law. Cupp v. Naughten, p. 141.

6. *Mandatory maternity leave—Teachers—Conclusive presumption.*—The mandatory termination provisions of Cleveland, Ohio, and Chesterfield County, Virginia, School Boards' rules requiring pregnant teachers to take maternity leave four (Chesterfield County) and five (Cleveland) months before expected childbirth, violate Due Process Clause of Fourteenth Amendment. The arbitrary cutoff dates (which obviously come at different times of school year for different teachers) have no valid relationship to State's interest in preserving continuity of instruction, as long as teacher is required to give substantial advance notice that she is pregnant. The challenged provisions are violative of due process since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties, whereas any such teacher's ability to continue past a fixed pregnancy period is an individual matter; and the school boards' administrative convenience alone cannot suffice to validate the arbitrary rules. Cleveland Board of Education v. LaFleur, p. 632.

CONSTITUTIONAL LAW—Continued.

7. *Mandatory maternity leave—Teachers—Return to work.*—Chesterfield County, Virginia, School Board return rule guaranteeing re-employment of teacher after mandatory maternity leave no later than first day of school year after date she is declared re-eligible, which rule is free of any unnecessary presumption, comports with due process requirements. Cleveland Board of Education v. LaFleur, p. 632.

8. *Mandatory maternity leave—Teachers—Return to work—Irrebuttable presumption.*—Provision of Cleveland, Ohio, School board rule making teacher ineligible to return to work after mandatory maternity leave until next regular semester after child is three months old, violates due process, being both arbitrary and irrational. It creates an irrebuttable presumption that mother (whose good health must be medically certified) is not fit to resume work, and it is not germane to maintaining continuity of instruction, as precise point a child will reach relevant age will occur at a different time throughout school year for each teacher. Cleveland Board of Education v. LaFleur, p. 632.

IV. Equal Protection of the Laws.

Absentee voting—Incarcerated misdemeanants or pretrial detainees.—Provisions of New York election laws, which allow absentee registration and voting to persons with, *inter alia*, physical disability, as construed by New York Court of Appeals not to include appellants, who are incarcerated in jail in county of their residence as convicted misdemeanants or pretrial detainees, but which provisions raise no question of disenfranchisement of persons convicted of criminal conduct and permit incarcerated persons to register and vote by absentee means if confined in a county where they are not residents, violate the Equal Protection Clause of the Fourteenth Amendment, as they arbitrarily discriminate between categories of qualified voters. O'Brien v. Skinner, p. 524.

V. Fifth Amendment.

1. *Compelled testimony—Loss of public contract.*—State could not compel testimony that had not been immunized, and waiver sought by State, under threat of loss of contracts, would have been no less compelled than a direct request for testimony without resort to waiver device. There is no constitutional distinction in terms of compulsion between threat of job loss in those cases and threat of contract loss to a contractor. Lefkowitz v. Turley, p. 70.

2. *Self-incrimination—Public contractors—Grand jury.*—The Fifth Amendment privilege against self-incrimination is not inapplicable

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simply because issue arises in context of official inquiries into job performance of public contractor. Ordinary rule is that privilege is available to witnesses called before grand jury as these appellees were, and State's legitimate interest in maintaining integrity of its civil service and of its transactions with independent contractors, like other state concerns, cannot override requirements of Fifth Amendment. Lefkowitz v. Turley, p. 70.

VI. First Amendment.

1. *Freedom of speech—Abusive language—Vagueness—Overbreadth.*—Ohio Supreme Court erred in finding no constitutional infirmity in lower court's holding that city ordinance punishing abuse of another by using menacing, insulting, slanderous, or profane language might constitutionally reach appellant's use of "fighting words," where ordinance, as construed by Ohio courts, is facially unconstitutional because it may be applied not only to punish unprotected but also protected speech. Even though a law may be valid as applied to conduct charged against particular defendant, he may raise its vagueness or unconstitutional overbreadth as applied to others, and, if law is found deficient in one of these respects, it may not be applied to him either, absent satisfactory limiting construction. Plummer v. City of Columbus, p. 2.

2. *Freedom of speech—Disorderly conduct.*—Cincinnati's disorderly conduct ordinance operated to deprive petitioner of his constitutionally protected freedom of speech, where it appeared that he was arrested and convicted merely because he verbally and negatively protested arresting officer's treatment of him, and there was no use of abusive language or fighting words. Norwell v. City of Cincinnati, p. 14.

3. *Freedom of Speech—Indiana disorderly conduct statute—Antiwar demonstration.*—Appellant's language, "We'll take the fucking street later (or again)," uttered in loud statement during antiwar demonstration on college campus, did not fall within any of "narrowly limited classes of speech" that States may punish without violating First and Fourteenth Amendments, and since evidence showed that words he used were not directed to any person or group and there was no evidence that they were intended and likely to produce *imminent* disorder, application of statute to appellant violated his rights of free speech. Hess v. Indiana, p. 105.

4. *Illinois Election Code—Right of political association—Primaries.*—Section 7–43 (d) of Code, which prohibits a person from voting in primary election of a political party if he has voted within preceding 23 months, unconstitutionally infringes upon right of free

CONSTITUTIONAL LAW—Continued.

political association protected by First and Fourteenth Amendments by "locking" voter in his pre-existing party affiliation for substantial period of time following his participation in any primary election, and State's legitimate interest in preventing party "raiding" cannot justify substantial restraint of 23-month rule. Kusper v. Pontikes, p. 51.

5. *Loyalty oath—Political parties.*—The loyalty oath requirement of the Indiana statute for political parties seeking a place on the ballot violates the First and Fourteenth Amendments. Communist Party of Indiana v. Whitcomb, p. 441.

6. *Place on ballot—Violent overthrow—Abstract doctrine.*—For purposes of determining whether to grant a place on the ballot, a group advocating violent overthrow as abstract doctrine need not be regarded as necessarily advocating unlawful action. Communist Party of Indiana v. Whitcomb, p. 441.

7. *State prohibition of advocacy of force—Access to ballot —Political parties and candidates—Voting.*—The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action, applies to state regulation burdening access to the ballot, rights of association in the political party of one's choice, casting an effective ballot, and in running for office, which are interests as substantial as those in other areas that this Court has protected against statutory schemes contrary to the First and Fourteenth Amendments. Communist Party of Indiana v. Whitcomb, p. 441.

VII. Fourth Amendment.

1. *Custodial arrest—Full search without warrant.*—In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment. United States v. Robinson, p. 218.

2. *Custodial arrest—Justification for search incident to arrest.*—A custodial arrest of a suspect based on probable cause is a reasonable intrusion under Fourth Amendment and a search incident to the arrest requires no additional justification, such as the probability in a particular arrest situation that weapons or evidence would in fact be found upon the suspect's person; and whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest need not be litigated in each case. United States v. Robinson, p. 218.

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3. *Custodial arrest—Search—No fear of suspect.*—Since the custodial arrest here gave rise to the authority to search, it is immaterial that arresting officer did not fear respondent or suspect that he was armed. United States v. Robinson, p. 218.

4. *Custodial arrest—Search incident to arrest—No fear of suspect.*—The full search of the person of the suspect made incident to a lawful custodial arrest did not violate Fourth and Fourteenth Amendments, and it is of no constitutional significance that, contrary to situation in *United States* v. *Robinson*, *ante*, p. 218, police regulations did not require that petitioner be taken into custody or establish conditions under which a full-scale body search should be conducted, nor, as in *Robinson*, is it relevant that the arresting officer had no subjective fear of petitioner or suspect that he was armed, since it is the fact of custodial arrest which gives rise to the authority to search. Gustafson v. Florida, p. 260.

5. *Exclusionary rule—Deterrent on police misconduct.*—The exclusionary rule, under which evidence obtained in violation of Fourth Amendment or fruits of such evidence cannot be used in a criminal proceeding against the victim of the illegal search and seizure, is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved. United States v. Calandra, p. 338.

6. *Exclusionary rule—Scope of application.*—Despite its broad deterrent purpose, the exclusionary rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served. United States v. Calandra, p. 338.

7. *Grand jury questions—Illegally obtained evidence.*—Grand jury questions based on evidence obtained from an unlawful search and seizure involve no independent governmental invasion of privacy, but rather the usual abridgment thereof common to all grand jury questioning. Such questions are only a derivative use of the product of a past unlawful search and seizure and work no new Fourth Amendment wrong. United States v. Calandra, p. 338.

8. *Grand jury witness.*—A witness summoned to appear and testify before a grand jury may not refuse to answer questions on ground that they are based on evidence obtained from an unlawful search and seizure. United States v. Calandra, p. 338.

9. *Grand jury witness—Exclusionary rule.*—Allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with

CONSTITUTIONAL LAW—Continued.

the effective and expeditious discharge of the grand jury's duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role. United States v. Calandra, p. 338.

10. *Search incident to arrest—Frisk—Standards.*—A search incident to a valid arrest is not limited to a frisk of suspect's outer clothing and removal of such weapons as arresting officer may, as a result of such frisk, reasonably believe suspect has in his possession, and absence of probable fruits or further evidence of particular crime for which arrest is made does not narrow standards applicable to such a search. United States v. Robinson, p. 218.

VIII. Sixth Amendment.

1. *Presence at trial—Waiver of right.*—Petitioner effectively waived his right to be present at his criminal trial by voluntarily absenting himself therefrom through failure to return to courtroom after morning session of first day of trial, and Court of Appeals properly applied Fed. Rule Crim. Proc. 43 and affirmed conviction, it being unnecessary to show that petitioner knew or had been expressly warned by trial court not only that he had right to be present but also that trial would continue in his absence and thereby effectively foreclose his right to testify and to confront personally witnesses against him. Taylor v. United States, p. 17.

2. *Right to counsel—Retroactivity.*—Persons convicted prior to decision in *Argersinger* v. *Hamlin*, 407 U. S. 25, are entitled to constitutional rule enunciated in that case that, absent knowing and intelligent waiver, indigent accused may not be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, if he was denied assistance of counsel, if they allege and prove a bona fide, existing case or controversy sufficient to invoke jurisdiction of a federal court. Berry v. City of Cincinnati, p. 29.

3. *Speedy trial—Prejudice—Reasons for delay—Parole—Rehabilitation.*—Where petitioner was tried for murder in Arizona almost three years after he was charged and 28 months after he first demanded that Arizona either extradite him from California, where he was serving prison term, or drop detainer against him, Arizona Supreme Court, in affirming denial of petitioner's pretrial habeas corpus application, erred in ruling that showing of prejudice to defense at trial was essential to establish federal speedy trial claim. In addition to possible prejudice, court must weigh reasons for delay in bringing incarcerated defendant to trial, and should also consider

CONSTITUTIONAL LAW—Continued.

possible impact pending charges might have on defendant's prospects for parole and meaningful rehabilitation. Moore v. Arizona, p. 25.

CONSTRUCTION OF STATUTES. See **Rail Passenger Service Act of 1970.**

CONTINUITY OF INSTRUCTION. See **Constitutional Law,** III, 6–8.

CONTRACTORS. See **Constitutional Law,** V, 1–2.

CONTRACTS OF EMPLOYMENT. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

CONTRACTUAL DUTY NOT TO STRIKE. See **Injunctions,** 1; **Labor,** 1–2; **Labor Management Relations Act.**

CONTRIBUTING TO DELINQUENCY. See **Constitutional Law,** III, 1.

CONVICTED MISDEMEANANTS. See **Constitutional Law,** IV.

COPULATION PER ANUM OR PER OS. See **Constitutional Law,** III, 3.

COSTS OF PRINTING PETITIONS FOR CERTIORARI. See **Rules of Supreme Court.**

COUNSEL. See **Appointment of Counsel; Constitutional Law,** VIII, 2.

COUNTY JAILS. See **Constitutional Law,** IV.

CREDIT CARDS. See **Criminal Law.**

CRIME AGAINST NATURE. See **Constitutional Law,** III, 3.

CRIMINAL LAW. See also **Appointment of Counsel; Constitutional Law,** I, 1–4; III, 1–3, 5; IV, 1–3; VII, 1–10; VIII, 1–3; **Grand Juries,** 1–3; **Injunctions,** 2; **Justiciability,** 1–3; **Narcotic Addict Rehabilitation Act of 1966,** 1–4; **Procedure,** 3.

Mail fraud—Credit card—Motels.—Motel operators' mailings of sales slips to Louisville bank resulting from respondent's use of one Meredith's credit card were not sufficiently closely related to respondent's scheme to bring his conduct within 18 U. S. C. § 1341. Though mailings were to be directed to adjusting accounts between respondent's victims (motels, Louisville bank, and Meredith), they were not for purpose of executing scheme embraced by statute since that scheme had already reached fruition when respondent checked out of motel and did not depend on which of his victims ultimately bore loss. United States v. Maze, p. 395.

CRUCIAL ELEMENTS OF OFFENSE. See **Constitutional Law**, III, 1.

CRYSTALLIZING OBJECTION TO WAR. See **Selective Service Regulations.**

CUSTODIAL ARRESTS. See **Constitutional Law**, VII, 1–4, 10.

CUSTODIAL WORKERS. See **Fair Labor Standards Act**, 1–2.

DAMAGES. See **Admiralty**, 1–3; **Jurisdiction**, 1.

DANGEROUS WEAPONS. See **Constitutional Law**, VII, 1–4, 10.

DEATH. See **Admiralty**, 1–2.

DEFENSE DEPARTMENT. See **Stays**, 1–3.

DEMOCRATIC PRIMARY. See **Abstention**; **Constitutional Law**, VI, 4.

DEMONSTRATIONS. See **Constitutional Law**, VI, 3.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Civil Rights Act of 1964**, 2.

DEPENDENTS. See **Admiralty**, 1–2.

DETAINER. See **Constitutional Law**, VIII, 3.

DETERRING POLICE MISCONDUCT. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

DISARMING SUSPECTS. See **Constitutional Law**, VII, 1–4, 10.

DISCHARGE OF EMPLOYEES. See **Judicial Review**, 3.

DISCONTINUANCE OF PASSENGER TRAINS. See **Rail Passenger Service Act of 1970.**

DISCRETION. See **Appeals**, 1.

DISCRIMINATION. See **Civil Rights Act of 1964**, 1–2; **Constitutional Law**, IV; **Equal Employment Opportunity Commission**; **Indians.**

DISMISSAL OF APPEAL. See **Appointment of Counsel.**

DISMISSALS FROM SUIT. See **Jurisdiction**, 1.

DISORDERLY CONDUCT. See **Constitutional Law**, VI, 2–3.

DISTRICT COURTS. See **Appeals**, 3; **Habeas Corpus**; **Jurisdiction**, 1; **Rail Passenger Service Act of 1970.**

DISTRICT OF COLUMBIA. See **Constitutional Law**, VII, 1–3, 10; **Habeas Corpus.**

DIVERSITY CLASS ACTIONS. See **Jurisdiction**, 1.

DIVERSITY JURISDICTION. See **Jurisdiction**, 1.

DOLLAR-VOLUME LIMITATION. See **Fair Labor Standards Act**, 1–2.

DOUBLE LIABILITY. See **Admiralty**, 1–2.

DRAFT BOARDS. See **Selective Service Regulations.**

DRIVER-SALESMEN. See **National Labor Relations Board**, 1–5.

DRIVERS' LICENSES. See **Constitutional Law**, VII, 1–4, 10.

DRUG ADDICTS. See **Constitutional Law**, III, 2; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

DRUGS. See **Constitutional Law**, III, 2; VII, 1–4, 10; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

DRUGSTORES. See **Constitutional Law**, III, 4; **Jurisdiction**, 5.

DUE PROCESS. See **Constitutional Law**, III; **Judicial Review**, 3; **Jurisdiction**, 5; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

DUTY TO ARBITRATE. See **Labor**, 1–3; **Labor Management Relations Act.**

EDUCATIONAL PROGRAMS. See **Civil Rights Act of 1964**, 2.

ELECTIONS. See **Abstention**; **Constitutional Law**, IV; VI, 4–7; **National Labor Relations Act.**

ELEMENTS OF DAMAGES. See **Admiralty**, 1–2.

ELEMENTS OF OFFENSE. See **Constitutional Law**, III, 1.

EMPLOYEES. See **Rail Passenger Service Act of 1970.**

EMPLOYER-EMPLOYEE DISPUTES. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

EMPLOYERS AND EMPLOYEES. See **Civil Rights Act of 1964**, 1; **Equal Employment Opportunity Commission**; **Fair Labor Standards Act**, 1–2; **Injunctions**, 1; **Judicial Review**, 3; **Labor**, 1–3; **Labor Management Relations Act.**

EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964**, 1; **Equal Employment Opportunity Commission.**

ENGLISH LANGUAGE INSTRUCTION. See **Civil Rights Act of 1964**, 2.

ENTERPRISE. See **Fair Labor Standards Act**, 1–2.

ENVIRONMENTAL LAW. See **Jurisdiction**, 1.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See also **Civil Rights Act of 1964.**

Guideline—Employment discrimination—Citizenship.—EEOC guideline providing that a lawful alien resident may not be discriminated against on basis of citizenship, though perhaps significant in a wide range of other situations, does not apply to respondent's refusal to hire Mexican citizen, a Texas resident, or support premise that discrimination on basis of citizenship is tantamount to discrimination on basis of national origin, since there is no showing that respondent (96% of whose San Antonio division employees are Mexican-Americans) discriminated against persons of Mexican origin. Espinoza v. Farah Mfg. Co., p. 86.

EQUAL-FOOTING DOCTRINE. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III, 2; IV; **Judicial Review**, 3; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

EQUITABLE RELIEF. See **Injunctions**, 2.

EQUITY. See **Injunctions**, 2.

EROSION. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

ESTOPPEL. See **Naturalization.**

EVIDENCE. See **Constitutional Law**, III, 1, 5; VII, 1–10; **Grand Juries**, 1–3.

EXCLUSIONARY RULE. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

EXCLUSIVE REMEDIES FOR BREACHES OF AMTRAK ACT. See **Rail Passenger Service Act of 1970.**

EXHAUSTION OF REMEDIES. See **Judicial Review**, 3.

EXTRADITION. See **Constitutional Law**, VIII, 3.

FACIAL UNCONSTITUTIONALITY. See **Constitutional Law**, VI, 1.

FAIR LABOR STANDARDS ACT.

1. *Manager of apartment complexes—"Employer" under Act.*—Petitioner partnership, whose managerial responsibilities at each of a number of apartment complexes give it substantial control of terms and conditions of work of employees at those buildings, is an "employer" under expansive definition of term in § 3 (d) of Act. Falk v. Brennan, p. 190.

FAIR LABOR STANDARDS ACT—Continued.

2. *Manager of apartment complexes—"Enterprise" under Act—Dollar-volume limitation.*—Petitioner partnership as manager of apartment complexes sells only its professional management services, and gross rentals it collects as part of those services do not represent sales attributable to its enterprise. The partnership's commissions are therefore relevant measure of its gross sales made or business done for purposes of dollar-volume limitation in § 3 (s) (1) of Act. Thus, though partnership is an "enterprise" under § 3 (r), Act does not apply to partnership as its commissions are below § 3 (s) (1) limitation. Falk v. Brennan, p. 190.

FAIR RENTAL VALUE. See **Jurisdiction**, 2–4.

FALSIFICATION OF RECORDS. See **Injunctions**, 1; **Labor**, 1; **Labor Management Relations Act.**

FEDERAL COMMON LAW. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

FEDERAL DISTRICT COURTS. See **Jurisdiction**, 1.

FEDERALLY FINANCED EDUCATIONAL PROGRAMS. See **Civil Rights Act of 1964**, 2.

FEDERAL PROBATIONARY EMPLOYEES. See **Judicial Review**, 3.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction**, 1–4.

FEDERAL QUESTIONS. See **Procedure**, 3.

FEDERAL RULES OF CIVIL PROCEDURE. See **Appeals**, 3; **Class Actions**, 1–2; **Judicial Review**, 2; **Jurisdiction**, 1; **National Labor Relations Board**, 4; **Statute of Limitations**, 1–3.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Constitutional Law**, VIII, 1.

FEDERAL SECURITIES POLICY. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

FEDERAL-STATE RELATIONS. See also **Accretion**, 1–3; **Admiralty**, 1–2; **Civil Rights Act of 1964**, 2; **Constitutional Law**, II; **Injunctions**, 2; **Judicial Review**, 2; **Jurisdiction**, 3; **Procedure**, 3; **Stays**, 4.

1. *"Applicable state laws"—§ 6 (c) of Securities Exchange Act—Arbitration—Validation of profit-sharing plan forfeiture clause.*—The "applicable state laws" referred to in § 6 (c) of Act, which subjects exchange rules to a requirement of consistency with Act, "and the applicable laws of the State in which it is located," are not in this

FEDERAL-STATE RELATIONS—Continued.

instance, merely because New York Stock Exchange is in New York City, the laws of New York so as to require California court to apply New York law compelling arbitration of this dispute and validating forfeiture clause of profit-sharing plan, since § 6 (c) has no independent existence creating some sort of spurious uniformity of application for all States but merely requires that any exchange rule adopted outside Act's context comport with laws of State in which exchange is located. Merrill Lynch, Pierce, Fenner & Smith v. Ware, p. 117.

2. *N. Y. Stock Exchange Rule—Securities Exchange Act—Exchange housekeeping—Wage claims—Need for uniform regulation.*—Rule 347 (b) cannot be categorized as part of a need for uniform national regulation, there being no revelation in Act or in any SEC regulation that nationwide uniformity of an exchange's housekeeping affairs is necessary, and it not being shown that national uniformity in area of wage claims is vital to federal securities policy. Merrill Lynch, Pierce, Fenner & Smith v. Ware, p. 117.

3. *N. Y. Stock Exchange Rule—Securities Exchange Act—Pre-emption of state law—Arbitration—Employer-employee disputes.*—Rule 347 (b) does not fall under the Exchange's mandate to protect the investing public and to insure just and equitable trade practices set forth in §§ 6 (d) and 19 (b) of Act, so as to require pre-emption of contrary state law by such rule, there being nothing in Act or any SEC rule or regulation specifying arbitration as a favored means of resolving employer-employee disputes, and it being clear that Rule 347 (b) would not be subject to SEC's modification or review under § 19 (b). Merrill Lynch, Pierce, Fenner & Smith v. Ware, p. 117.

4. *N. Y. Stock Exchange Rules—Pre-emption—Wage relief under state law.*—Rules 345 (a)(1) and 347 (b), promulgated as self-regulatory measures pursuant to § 6 of Securities Exchange Act of 1934, and respondent's pledge to abide by those rules, do not pre-empt avenues of wage relief otherwise available to respondent under California law. Merrill Lynch, Pierce, Fenner & Smith v. Ware, p. 117.

5. *Ownership of abandoned riverbed—Federal law governance.*—Ownership of land previously submerged by movement of Colorado River but later abandoned by river as result of federal rechanneling project is governed by federal law. Issue is not what rights State has accorded private owners in lands that State holds as sovereign but how far State's sovereign right extends under equal-footing doctrine and federal Submerged Lands Act, *i. e.*, whether State retains title to lands formerly beneath the Colorado or whether title

FEDERAL-STATE RELATIONS—Continued.

thereto is defeasible by withdrawal of those waters. Bonelli Cattle Co. v. Arizona, p. 313.

6. *Protection of wage earners—State policy—Noninterference with federal regulation—Securities Exchange Act.*—Where California has manifested a strong statutory policy of protecting its wage earners from what it regards as undesirable economic pressure affecting the employment relationship, that policy should prevail absent any interference with federal regulatory scheme; in this case there is not only no such interference, but Act's structure manifests a congressional intent that state policies in this area should operate vigorously. Merrill Lynch, Pierce, Fenner & Smith v. Ware, p. 117.

FELONIES. See **Constitutional Law**, III, 2; VIII, 2; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

FEMALE TEACHERS. See **Constitutional Law**, III, 6–8.

FIFTH ACT OF BANKRUPTCY. See **Appeals**, 2.

FIFTH AMENDMENT. See **Constitutional Law**, III, 2; V; VII, 5–9; **Grand Juries**, 1–3; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

FIGHTING WORDS. See **Constitutional Law**, VI, 1–3.

FILIPINOS. See **Naturalization.**

FINAL JUDGMENTS. See **Jurisdiction**, 5.

FIRST AMENDMENT. See **Constitutional Law**, VI.

FISHING RIGHTS. See **Indians**; **Procedure**, 3.

FLORIDA. See **Constitutional Law**, III, 3.

FOREMEN. See **Injunctions**, 1; **Labor**, 1; **Labor Management Relations Act.**

FORFEITURE CLAUSES. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

FORFEITURE OF BENEFITS. See **Federal-State Relations**, 1–4, 6.

FOURTEENTH AMENDMENT. See **Constitutional Law**, III, 4–8; IV; V, 1–2; VI, 3–5; VII, 4; **Judicial Review**, 3; **Jurisdiction**, 5.

FOURTH AMENDMENT. See **Constitutional Law**, VII; **Grand Juries**, 1–3.

FRAUD. See **Criminal Law.**

FREEDOM OF ASSOCIATION. See **Constitutional Law**, VI, 4, 5–7.

FREEDOM OF SPEECH. See **Constitutional Law**, VI, 1–3, 5–7.

FREEDOM OF THE PRESS. See **Constitutional Law**, VI, 5–7.

FRISKING SUSPECTS. See **Constitutional Law**, VII, 1–4, 10.

FRUITS OF ILLEGALLY SEIZED EVIDENCE. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

FULL-CUSTODY ARRESTS. See **Constitutional Law**, VII, 1–4, 10.

FULL-SCALE BODY SEARCHES. See **Constitutional Law**, VII, 1–4, 10.

FUNERAL EXPENSES. See **Admiralty**, 1–2.

FUTURE WAGES. See **Admiralty**, 1–2.

GAMBLING. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

GERMANY. See **Habeas Corpus.**

GRAND JURIES. See also **Constitutional Law**, V, 1–2.

1. *Witness—Exclusionary rule—Interference with grand jury.*—Allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, and extending the rule to grand jury proceedings would achieve only a speculative and minimal advance in deterring police misconduct at the expense of substantially impeding the grand jury's role. United States v. Calandra, p. 338.

2. *Witness—Fourth Amendment.*—A witness summoned to appear and testify before a grand jury may not refuse to answer questions on ground that they are based on evidence obtained from an unlawful search and seizure. United States v. Calandra, p. 338.

3. *Witness—Questions—Fourth Amendment.*—Grand jury questions based on evidence obtained from an unlawful search and seizure involve no independent governmental invasion of privacy, but rather the usual abridgment thereof common to all grand jury questioning. Such questions are only a derivative use of the product of a past unlawful search and seizure and work no new Fourth Amendment wrong. United States v. Calandra, p. 338.

GRAND JURY WITNESSES. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

GROSS COMMISSIONS. See **Fair Labor Standards Act**, 1–2.

GROSS RENTALS OR SALES. See **Fair Labor Standards Act**, 1–2.

GUIDELINES. See **Equal Employment Opportunity Commission.**

HABEAS CORPUS. See also **Appointment of Counsel; Constitutional Law,** VIII, 3.

Serviceman abroad—Unlawful retention—Transfer of case.—Habeas corpus application by serviceman stationed in Germany, alleging that he is being unlawfully retained in Army, is transferred to District Court for District of Columbia pursuant to 28 U. S. C. § 2241 (b), since, although respondent commanding officer is also in Germany, others in chain of command, as well as other named respondents—Chief of Personnel Action and Secretary of Army—are in District of Columbia. Ex parte Hayes (DOUGLAS, J., in chambers), p. 1327.

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Civil Rights Act of 1964,** 2; **Stays,** 4.

HEARINGS. See **Judicial Review,** 3.

HEROIN. See **Constitutional Law,** VII, 1–3, 10.

HOUSEKEEPING AFFAIRS OF STOCK EXCHANGE. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

ILLEGAL BOND PRACTICES. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4.

ILLEGAL JURY-FEE PRACTICES. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4.

ILLEGALLY SEIZED EVIDENCE. See **Constitutional Law,** VII, 1–10; **Grand Juries,** 1–3.

ILLEGAL SEARCHES AND SEIZURES. See **Constitutional Law,** VII, 1–10; **Grand Juries,** 1–3.

ILLEGAL SENTENCING PRACTICES. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4.

ILLINOIS. See **Abstention; Constitutional Law,** I, 1–4; VI, 4; **Injunctions,** 2; **Justiciability,** 1–4; **Procedure,** 2; **Stays,** 4.

IMMINENT DISORDER. See **Constitutional Law,** VI, 3.

IMMINENT LAWLESS ACTION. See **Constitutional Law,** VI, 3, 5–7.

IMMUNITY FROM PROSECUTION. See **Constitutional Law,** V, 1–2.

INCARCERATION. See **Constitutional Law,** IV.

INCITING LAWLESS ACTION. See **Constitutional Law,** VI, 3, 5–7.

INDEPENDENT CONTRACTORS. See **National Labor Relations Board**, 1–5.

INDEPENDENT EXAMINATION OF RECORD. See **Constitutional Law**, III, 1.

INDIANA. See **Constitutional Law**, VI, 3, 5–7.

INDIANA UNIVERSITY. See **Constitutional Law**, VI, 3.

INDIAN RESERVATIONS. See **Jurisdiction**, 2–4; **Procedure**, 3.

INDIANS. See also **Jurisdiction**, 2–4; **Procedure**, 3.

Netfishing rights—Discrimination.—Commercial net fishing by Puyallup Indians, for which Indians have treaty protection, forecloses bar against net fishing of steelhead trout imposed by Washington State Game Department's regulation, which discriminates against Puyallups, and as long as steelhead fishing is permitted, regulation must achieve accommodation between Puyallups' netfishing rights and rights of sports fishermen. Washington Game Dept. v. Puyallup Tribe, p. 44.

INDIAN TITLE. See **Jurisdiction**, 2–4.

INDIAN TREATIES. See **Indians**; **Jurisdiction**, 2–4.

INDIGENTS. See **Appointment of Counsel**; **Constitutional Law**, VIII, 2.

IN FORMA PAUPERIS PROCEEDINGS. See **Rules of Supreme Court.**

INITIATION FEES. See **National Labor Relations Act.**

INJUNCTIONS. See also **Appeals**, 3; **Labor**, 1–3; **Labor Management Relations Act**; **National Labor Relations Board**, 1–5; **Procedure**, 2; **Stays**, 1–3.

1. *Breach of no-strike obligation—Irreparable harm—No safety issue—Pending arbitration.*—The circumstances of this case satisfy traditional equitable considerations controlling the availability of injunctive relief, the District Court having found that union's continued breach of its no-strike obligation would irreparably harm petitioner, and having eliminated any safety issue by suspending foremen who falsified coal mine airflow records pending a final arbitral decision on dispute involving alleged safety hazard created by retention of foremen. Gateway Coal Co. v. Mine Workers, p. 368.

2. *No basis for equitable relief—Federal court's intrusion into state criminal proceedings—No irreparable injury—Adequate legal remedies.*—Even if the complaint in civil rights action against magistrate and judge alleging illegal bond-setting, sentencing, and jury-fee practices in criminal cases were considered to present an existing case or

INJUNCTIONS—Continued.

controversy, no adequate basis for equitable relief has been stated where injunctive relief sought by respondents would constitute a major continuing intrusion of equitable power of federal courts into daily conduct of state criminal proceedings, and would sharply conflict with recognized principles of equitable restraint, and respondents also failed to establish basic requisites of issuance of equitable relief—likelihood of substantial and immediate irreparable injury, and inadequacy of remedies at law—in view of conjectural nature of threatened injury to which respondents are allegedly subjected, and where there are available other procedures, both state and federal, which could provide relief. O'Shea v. Littleton, p. 488.

INMATE VOTING. See **Constitutional Law,** IV.

IN-SERVICE DETERMINATIONS. See **Selective Service Regulations.**

INSTRUCTIONS TO JURY. See **Constitutional Law,** III, 5.

INSULTING LANGUAGE. See **Constitutional Law,** VI, 1.

INTERCITY RAIL PASSENGER SERVICE. See **Rail Passenger Service Act of 1970.**

INTERSTATE COMMERCE. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

INTERVENTION. See **Appeals,** 1; **Class Actions,** 1–2; **Statute of Limitations,** 1–3.

INVOLUNTARY COMMITMENT OF MENTAL PATIENTS. See **Appeals,** 3.

IRREBUTTABLE PRESUMPTIONS. See **Constitutional Law,** III, 6–8.

IRREPARABLE INJURY. See **Injunctions,** 1–2; **Labor Management Relations Act.**

JAILS. See **Constitutional Law,** IV.

JOB PERFORMANCE. See **Constitutional Law,** V, 1–2.

JOINT AND SEVERAL LIABILITY. See **National Labor Relations Board,** 1–5.

JUDGES. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4.

JUDGMENTS. See **Appeals,** 4; **Jurisdiction,** 5; **Stays,** 4.

JUDICIAL ENFORCEMENT. See **Judicial Review,** 2; **National Labor Relations Act; National Labor Relations Board,** 4.

JUDICIAL REVIEW. See also **Appeals**, 3; **National Labor Relations Act**; **National Labor Relations Board**, 1–5; **Stays**, 4.

1. *Commodities Exchange Commission—Adjudication—Commodity Exchange Act violations—Exchange's failure to enforce own rules.*—The Commission, whose administrative functions appear to encompass adjudication of charges against petitioner of violating Sherman Act and Commodity Exchange Act and failure to enforce its own rules, should pass on those charges in first instance. Chicago Mercantile Exchange v. Deaktor, p. 113.

2. *Court of Appeals—NLRB—Standard of review.*—Court of Appeals did not err in determining that, on record as a whole, substantial evidence supported NLRB's finding that one petitioner purchased business of other petitioner with knowledge of unfair labor practice litigation, since it cannot be said on basis of record that Court of Appeals "misapprehended or grossly misapplied" standard of review. Golden State Bottling Co. v. NLRB, p. 168.

3. *Unemployment Compensation for Federal Employees Program—Denial of benefits—Hearing—Administrative procedures.*—Any decision upon claims of appellant former federal probationary employees, whom State denied benefits under UCFE Program, that Program denied them hearing on basis for their removal from federal service in deprivation of due process and equal protection, would be premature in view of fact that record does not disclose that state agency, in notifying appellants of adverse determinations, informed them, as it was required to do by applicable regulation, of their "right to additional information or reconsideration and correction" of findings by employing agencies; or that appellants invoked available procedure entitling them to request their agencies "to reconsider and correct" those findings. District Court's dismissal of suit as to both federal and state defendants is therefore vacated with directions that court determine whether appellants should be permitted to invoke applicable administrative procedures. Christian v. New York Department of Labor, p. 614.

JUDICIAL TOLLING OF STATUTE OF LIMITATIONS. See **Class Actions**, 1–2; **Statute of Limitations**, 1–3.

JURIES. See **Constitutional Law**, III, 5.

JURISDICTION. See also **Appeals**, 3; **Constitutional Law**, III, 4; VIII, 2; **Habeas Corpus**; **Procedure**, 1; **Rail Passenger Service Act of 1970.**

1. *Class action—Jurisdictional amount—Lake pollution.*—Multiple plaintiffs with separate and distinct claims must each satisfy jurisdictional amount for suits in federal courts, and in this diversity

JURISDICTION—Continued.

class action under Fed. Rule Civ. Proc. 23 (b)(3) by owners of lakeshore property charging respondent with polluting lake, where only named plaintiffs but not unnamed plaintiffs could show damages in jurisdictional amount, a class action is not maintainable. Each plaintiff in a Rule 23 (b)(3) class action must satisfy jurisdictional amount and any plaintiff who does not must be dismissed from case. Zahn v. International Paper Co., p. 291.

2. *Federal question—Indians' action for rental value of land—New York—Indian disputes.*—The conclusion that action by Indian Nations against New York counties for fair rental value of certain land arises under laws of United States comports with language and legislative history of 25 U. S. C. § 233 granting to New York civil jurisdiction over disputes between Indians or between Indians and others. Oneida Indian Nation v. County of Oneida, p. 661.

3. *Federal question—Indians' action for rental value of land—Treaties—Nonintercourse Act.*—Complaint in petitioners' action for fair rental value for a specified period of certain land in New York that Oneidas had ceded to State in 1795, alleging, *inter alia*, that Oneidas had owned and occupied land from time immemorial to time of American Revolution; that in 1780's and 1790's various treaties with United States had confirmed their right to possession of land until purchased by United States; that in 1790 treaties had been implemented by Nonintercourse Act forbidding conveyance of Indian lands without United States' consent; and that 1795 cession was without such consent and hence ineffective to terminate Oneidas' right to possession under treaties and applicable federal statutes, states a controversy arising under Constitution, laws, or treaties of United States sufficient to invoke jurisdiction of District Court under 28 U. S. C. §§ 1331 and 1362. Oneida Indian Nation v. County of Oneida, p. 661.

4. *Federal question—Indians' action for rental value of land—Well-pleaded complaint rule.*—In sustaining District Court's jurisdiction over Indian Nations' action for fair rental value of certain land, well-pleaded complaint rule of *Taylor* v. *Anderson*, 234 U. S. 74, is not disturbed, since here right to possession itself is claimed to arise under federal law in first instance, and allegedly aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. Oneida Indian Nation v. County of Oneida, p. 661.

5. *Supreme Court—"Final" state court judgment—Unconstitutionality of pharmacy-permits statute.*—This Court does not lack jurisdiction to review State Supreme Court's judgment holding un-

JURISDICTION—Continued.

constitutional a state statute under which respondent had been denied pharmacy permit for failure to meet statutory requirement that it be corporation, majority stock of which is owned by registered pharmacists, which judgment is "final" within meaning of 28 U. S. C. § 1257, for it is not apparent how petitioner Board would be able to preserve constitutional issue now ready for adjudication without defying State Supreme Court. North Dakota Pharmacy Bd. v. Snyder's Stores, p. 156.

JURISDICTIONAL AMOUNT. See **Jurisdiction**, 1.

JURY-FEE PRACTICES. See **Constitutional Law**, I, 1–4; **Injunctions**, 2; **Justiciability**, 1–4.

JUSTICIABILITY.

1. *Case or controversy—Civil rights action—Insufficient allegations.*—The complaint in civil rights action against magistrate and judge alleging illegal bond-setting, sentencing, and jury-fee practices in criminal cases fails to satisfy threshold requirement of Art. III of Constitution that those who seek to invoke power of federal courts must allege an actual case or controversy, where none of named plaintiffs is identified as having himself suffered any injury in the manner specified, claim alleging injury is in only most general terms, and there are no allegations that any relevant state criminal statute is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law. O'Shea v. Littleton, p. 488.

2. *Case or controversy—Class action.*—If none of named plaintiffs purporting to represent a class meets case-or-controversy requirement, none may seek relief on behalf of himself or any other member of class. O'Shea v. Littleton, p. 488.

3. *Case or controversy—Prosecution for violation of valid laws.*—Case-or-controversy requirement is not satisfied by general assertions or inferences that in course of their activities respondents will be prosecuted for violating valid criminal laws. O'Shea v. Littleton, p. 488.

4. *Case or controversy—Remote threat of injury.*—Where it can only be speculated whether respondents will be arrested for violating an ordinance or state statute, particularly in absence of allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct, and respondents have not pointed to any imminent prosecutions contemplated against them so that they do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or that it is otherwise

JUSTICIABILITY—Continued.

their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is too remote to satisfy case-or-controversy requirement and permit adjudication by federal court. O'Shea v. Littleton, p. 488.

LABOR. See also **Fair Labor Standards Act**, 1–2; **Injunctions**, 1; **Judicial Review**, 2; **Labor Management Relations Act; National Labor Relations Act; National Labor Relations Board**, 1–5.

1. *Arbitration—Collective-bargaining agreement—Coal mine—Local trouble—Safety hazard.*—The arbitration clause of a collective-bargaining agreement between a coal mine operator and union covering, *inter alia*, "any local trouble of any kind aris[ing] at the mine" is sufficiently broad to encompass dispute involving alleged safety hazard created by retention of foremen who falsified records as to airflow in coal mine, the foremen's continued presence in mine being plainly a local issue. On its face such contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire. Gateway Coal Co. v. Mine Workers, p. 368.

2. *Arbitration—Duty to arbitrate—No-strike obligation—Injunction.*—The duty to arbitrate imposed by the collective-bargaining agreement gave rise to an implied no-strike obligation supporting issuance of an injunction against a work stoppage, since in the absence of an explicit expression negating any implied no-strike obligation the agreement to arbitrate and the duty not to strike should be construed as having coterminous application. Gateway Coal Co. v. Mine Workers, p. 368.

3. *Arbitration—Presumption of arbitrability—Safety disputes.*—The "presumption of arbitrability" (an order to arbitrate particular grievance should not be denied unless it may be said with positive assurance that arbitration clause is not susceptible of an interpretation that covers asserted dispute, and doubts should be resolved in favor of coverage) applies to safety disputes. Gateway Coal Co. v. Mine Workers, p. 368.

LABOR ELECTIONS. See **National Labor Relations Act.**

LABOR MANAGEMENT RELATIONS ACT. See also **Injunctions**, 1; **Labor**, 1–3.

Dangerous work conditions—Employees' quitting—No-strike obligation.—On facts, § 502 of LMRA providing that quitting of labor by employees in good faith because of abnormally dangerous conditions for work shall not be deemed a strike, did not deprive District Court

LABOR MANAGEMENT RELATIONS ACT—Continued.
of authority to enforce no-strike obligation, suspension of foremen for falsifying airflow records in coal mine pending a final arbitral decision on dispute involving alleged safety hazard created by retention of foremen having eliminated any safety issue. Gateway Coal Co. v. Mine Workers, p. 368.

LABOR UNIONS. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act**; **National Labor Relations Act**; **Rail Passenger Service Act of 1970.**

LAKE CHAMPLAIN. See **Jurisdiction**, 1.

LANGUAGE SKILLS. See **Civil Rights Act of 1964**, 2.

LEGISLATIVE HISTORY. See **Rail Passenger Service Act of 1970.**

LEGITIMATE STATE INTERESTS. See **Constitutional Law**, III, 6; VI, 4.

LIMITATION OF ACTIONS. See **Appeals**, 1; **Class Actions**, 1–2; **Naturalization**; **Procedure**, 1; **Statute of Limitations**, 1–3.

LINGUISTIC DEFICIENCIES. See **Civil Rights Act of 1964**, 2.

LIQUIDATORS. See **Appeals**, 2.

LOANSHARKING. See **Constitutional Law**, VII, 5–9; **Grand Juries**, 1–3.

LOCAL ISSUES. See **Labor**, 1–3; **Labor Management Relations Act.**

"LOCKING IN" OF VOTERS. See **Constitutional Law**, VI, 4.

LONGSHOREMEN. See **Admiralty**, 1–2.

LOSS OF FUTURE WAGES. See **Admiralty**, 1–2.

LOSS OF SERVICES. See **Admiralty**, 1–2.

LOSS OF SOCIETY. See **Admiralty**, 1–2.

LOSS OF SUPPORT. See **Admiralty**, 1–2.

LOYALTY OATHS. See **Constitutional Law**, VI, 5–7.

MAGISTRATES. See **Constitutional Law**, I, 1–4; **Injunctions**, 2; **Justiciability**, 1–4.

MAIL FRAUD STATUTE. See **Criminal Law.**

MAINTENANCE PERSONNEL. See **Fair Labor Standards Act**, 1–2.

MANAGEMENT SERVICES. See **Fair Labor Standards Act**, 1–2.

MANDATES. See **Stays**, 4.

MANDATORY MATERNITY LEAVE RULES. See **Constitutional Law**, III, 6–8.

MARIHUANA. See **Constitutional Law**, VII, 4.

MARITIME INJURIES. See **Admiralty**, 1–2.

MARITIME WRONGFUL-DEATH ACTIONS. See **Admiralty**, 1–2.

MASTURBATION. See **Constitutional Law**, III, 1.

MATERNITY LEAVE. See **Constitutional Law**, III, 6–8.

MATTER IN CONTROVERSY. See **Jurisdiction**, 1.

MENACING LANGUAGE. See **Constitutional Law**, VI, 1.

MENTAL PATIENTS. See **Appeals**, 3.

MERCANTILE EXCHANGES. See **Judicial Review**, 1.

MEXICAN-AMERICANS. See **Civil Rights Act of 1964**, 1; **Equal Employment Opportunity Commission.**

MEXICAN CITIZENS. See **Civil Rights Act of 1964**, 1; **Equal Employment Opportunity Commission.**

MILITARY ACTIVITIES. See **Stays**, 1–3.

MINERAL RIGHTS. See **Procedure**, 1.

MINERS. See **Injunctions**, 1; **Labor**,1–3; **Labor Management Relations Act.**

MINES. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act.**

MINIMUM WAGES. See **Fair Labor Standards Act**, 1–2.

MINORITY GROUPS. See **Civil Rights Act of 1964**, 2.

MISDEMEANANTS. See **Constitutional Law**, IV.

MISDEMEANORS. See **Constitutional Law**, VIII, 2.

MOBILE VOTER REGISTRATION. See **Constitutional Law**, IV.

MOOTNESS. See **Appeals**, 2; **Procedure**, 2.

MOTELS. See **Criminal Law.**

MULTIPLE OFFENDERS. See **Constitutional Law**, III, 2; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

MULTIPLE PLAINTIFFS. See **Jurisdiction**, 1.

NAMED PLAINTIFFS. See **Jurisdiction**, 1.

NARCOTIC ADDICT REHABILITATION ACT OF 1966. See also **Constitutional Law, III, 2.**

1. *Congress' latitude—Experimental program.*—Congress should have a wide latitude in formulating an experimental program like NARA, involving as it does medical and scientific uncertainties. Marshall v. United States, p. 417.

2. *Two-prior-felony exclusion—Exploitation—Risk.*—In excluding multiple offenders from NARA Congress could safeguard that experimental program from possible improper exploitation and also avoid a possible unacceptable risk to society represented by a reduced level of deterrence. Marshall v. United States, p. 417.

3. *Two-prior-felony exclusion—Interference with program.*—Congress could reasonably assume that because of the nature of addiction treatment the multiple-felony offender would less likely benefit from and might interfere with a rehabilitation program under NARA. Marshall v. United States, p. 417.

4. *Two-prior-felony exclusion—Scope.*—In adopting the two-prior-felony exclusion Congress sought to exclude from NARA treatment (1) those less likely to be rehabilitated thereby and (2) those with a "history of serious crimes." Marshall v. United States, p. 417.

NARCOTIC ADDICTS. See **Constitutional Law,** III, 2; VII, 1–4, 10; **Narcotic Addict Rehabilitation Act of 1966,** 1–4.

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1968. See **Injunctions,** 1; **Labor,** 1–3; **Labor Management Relations Act.**

NATIONALITY ACT OF 1940. See **Naturalization.**

NATIONAL LABOR POLICIES. See **National Labor Relations Board,** 1–5.

NATIONAL LABOR RELATIONS ACT. See also **Judicial Review,** 2; **National Labor Relations Board,** 1–5.

Waiver of union initiation fees—Certification election—Right not to join union—Choice of bargaining representative.—A labor union's offer to waive initiation fees for all employees who sign union authorization cards before a certification election under Act interferes with employees' right to refrain from union activities guaranteed by § 7 of Act; does not comport with principle of "fair and free choice of bargaining representatives by employees" that is inherent in § 9 (c) (1)(A); and is ground for denying enforcement of an order against employer to bargain with union after it wins election. NLRB v. Savair Manufacturing Co., p. 270.

NATIONAL LABOR RELATIONS BOARD. See also **Judicial Review**, 2; **National Labor Relations Act.**

1. *Backpay—Predecessor and successor employers—Joint and several liability.*—NLRB did not err in ordering both firms jointly or severally to pay driver-salesman a specified sum of backpay, since an offending predecessor-employer should at least be required to make dischargee whole for any loss of pay suffered by reason of discharge until such time as he secures substantially equivalent employment, since joint and several liability will more fully insure that employee is fully recompensed by protecting him against, *e. g.*, successor's insolvency, and since possibility that successor will unjustifiably delay reinstatement to predecessor's prejudice can be met by a protective provision in contract of sale. Golden State Bottling Co. v. NLRB, p. 168.

2. *Backpay—Putative earnings as independent contractor.*—Fact that driver-salesman, but for his discharge as an ordinary employee would, under petitioner employer's policy, have become a distributor about a year later and as an independent contractor would have been excluded from National Labor Relations Act coverage, did not preclude NLRB from including in gross backpay computation dischargee's putative earnings as a distributor, since a reinstatement and backpay order is aimed at restoring status quo that would have obtained but for employer's unfair labor practice. Golden State Bottling Co. v. NLRB, p. 168.

3. *Discretion—Conflicting interests—Bona fide successor, the public, and employee—Equitable balance—National labor policies.*—NLRB properly exercised its discretion in issuing order against petitioner successor employer by striking an equitable balance among conflicting legitimate interests of bona fide successor, public, and affected employee for purposes of effectuating national labor policies of avoiding labor strife, preventing a deterrent effect on exercise of rights guaranteed employees by § 7 of NLRA, and protecting victimized employee, such policies being achieved at a relatively minimal cost to bona fide successor. Golden State Bottling Co. v. NLRB, p. 168.

4. *Fed. Rule Civ. Proc. 65 (d)—Injunction—Judicial review—Bona fide successor—Unfair labor practice.*—Fed. Rule Civ. Proc. 65 (d), which provides that injunctions and restraining orders shall be binding only upon parties to action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of order, does not bar judicial enforcement of NLRB order running to petitioner successor employer, since a bona fide successor, acquiring, with knowledge that wrong remains unremedied, employing enterprise

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NATIONAL LABOR RELATIONS BOARD—Continued.

which was locus of unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65 (d). Golden State Bottling Co. v. NLRB, p. 168.

5. *Reinstatement and backpay order—Bona fide successor—Remedial powers.*—Issuance of a reinstatement and backpay order against a bona fide successor that did not itself commit unfair labor practice does not exceed NLRB's remedial powers under § 10 (c) of National Labor Relations Act, since such powers include broad discretion to fashion and issue such an order in order to achieve ends and effectuate policies of Act. Golden State Bottling Co. v. NLRB, p. 168.

"NATIONAL ORIGIN." See **Civil Rights Act of 1964**, 1; **Equal Employment Opportunity Commission.**

NATIONAL-ORIGIN MINORITY GROUPS. See **Civil Rights Act of 1964**, 2.

NATURALIZATION.

Noncitizens in Armed Forces—Late application—Failure to publicize rights—Estoppel.—Neither failure to publicize rights to naturalization afforded by Nationality Act of 1940 to noncitizens who served in United States Armed Forces during World War II nor failure to have authorized naturalization representative stationed in Philippine Islands during time such rights were available, estopped Government from relying on fact that deadline for filing naturalization applications such as respondent Filipino's had expired more than 20 years earlier. INS v. Hibi, p. 5.

NAVIGABLE RIVERS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

NET FISHING. See **Indians.**

NEW YORK. See **Constitutional Law**, IV; V, 1–2; **Jurisdiction**, 2–4.

NEW YORK STOCK EXCHANGE. See **Appeals**, 2; **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

NON-ENGLISH SPEAKING STUDENTS. See **Civil Rights Act of 1964**, 2.

NONINTERCOURSE ACT. See **Jurisdiction**, 2–4.

NO-STRIKE OBLIGATION. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act.**

NOTICE OF APPEAL. See **Appeals**, 4.

OHIO. See **Constitutional Law,** III, 6, 8; VI, 1–2.

OPERATORS' PERMITS. See **Constitutional Law,** VII, 1–4, 10.

ORAL SEXUAL ACTIVITY. See **Constitutional Law,** III, 3.

ORDER GRANTING INJUNCTION. See **Appeals,** 3.

OREGON. See **Constitutional Law,** III, 5.

OVERBREADTH. See **Constitutional Law,** VI, 1.

OVERTHROW OF GOVERNMENT. See **Constitutional Law,** VI, 5–7.

PAROLE. See **Constitutional Law,** VIII, 3.

PARTIES. See **Class Actions,** 1–2; **Statute of Limitations,** 1–3.

PARTNERSHIPS. See **Fair Labor Standards Act,** 1–2.

PARTY AFFILIATIONS. See **Abstention; Constitutional Law,** VI, 4.

PASSENGER TRAIN DISCONTINUANCES. See **Rail Passenger Service Act of 1970.**

PATDOWNS. See **Constitutional Law,** VII, 1–4, 10.

PENAL INSTITUTIONS. See **Constitutional Law,** IV.

PERMITS FOR PHARMACY. See **Constitutional Law,** III, 4; **Jurisdiction,** 5.

PERSONAL INJURIES. See **Admiralty,** 1–2.

PETITIONS FOR CERTIORARI. See **Rules of Supreme Court.**

PETTY OFFENSES. See **Constitutional Law,** III, 2.

PHARMACISTS. See **Constitutional Law,** III, 4; **Jurisdiction,** 5.

PHARMACY PERMITS. See **Constitutional Law,** III, 4; **Jurisdiction,** 5.

PHILIPPINE ISLANDS. See **Naturalization.**

PHYSICAL DISABILITY TO TEACH. See **Constitutional Law,** III, 6–8.

PHYSICAL DISABILITY TO VOTE. See **Constitutional Law,** IV.

PLEADINGS. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4; **Jurisdiction,** 2–4; **Procedure,** 2.

PLENARY JUDICIAL REVIEW. See **Appeals,** 3.

POLICE DEPARTMENT PROCEDURES. See **Constitutional Law,** VII, 1–4, 10.

POLICE MISCONDUCT. See **Constitutional Law,** VII, 5–9; **Grand Juries,** 1–3.

POLICE OFFICERS. See **Constitutional Law,** VI, 2; VII, 1–4, 10.

POLITICAL PARTIES. See **Abstention; Constitutional Law,** VI, 4–7.

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POSSESSORY ACTIONS. See **Jurisdiction,** 2–4.

POSSESSORY RIGHTS. See **Jurisdiction,** 2–4.

POSTAL SERVICE. See **Criminal Law.**

PRE-EMPTION. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

PREGNANT TEACHERS. See **Constitutional Law,** III, 6–8.

PRESENCE AT TRIAL. See **Constitutional Law,** VIII, 1.

PRESUMPTION OF ARBITRABILITY. See **Labor,** 1–3; **Labor Management Relations Act.**

"PRESUMPTION OF TRUTHFULNESS" INSTRUCTION. See **Constitutional Law,** III, 5.

PRESUMPTIONS. See **Constitutional Law,** III, 5–8.

PRETRIAL DETAINEES. See **Constitutional Law,** IV.

PRIMARY ELECTIONS. See **Abstention; Constitutional Law,** III, 4.

PRINTING PETITIONS FOR CERTIORARI. See **Rules of Supreme Court.**

PRISONERS. See **Constitutional Law,** IV; VIII, 3.

PRISONS. See **Constitutional Law,** IV.

PRIVATE CAUSES OF ACTION. See **Rail Passenger Service Act of 1970.**

PROBABLE CAUSE. See **Constitutional Law,** VII, 1–4, 10.

PROBATIONARY EMPLOYEES. See **Judicial Review,** 3.

PROCEDURE. See also **Abstention; Judicial Review,** 1, 3; **Jurisdiction,** 1; **Selective Service Regulations; Stays,** 1–4.

1. *Advisory Opinion—Remand—State ground for denying claim.*— Where it appears that running of limitations period might have been trial court's independent ground for denying appellants' mineral rights claim, so that any decision of this Court on whether tax-sale notice provisions of state law meet federal due process requirements

PROCEDURE—Continued.

would be advisory and beyond Court's jurisdiction, court below should consider whether appellants preserved right to challenge trial court's determination that statute of limitations bars their claim, and whether under state law it does so irrespective of constitutional adequacy of tax-sale notice provisions. Paschall v. Christie-Stewart, Inc., p. 100.

2. *Civil rights action—Successor state's attorney—Lack of controversy—Remand—Mootness—Amendment of complaint.*—Where, on record, respondents, who brought civil rights action charging petitioner's predecessor as State's Attorney with racial discrimination, have never charged petitioner with anything and do not presently seek to enjoin him from doing anything, so that there may no longer be a controversy between respondents and any Alexander County State's Attorney concerning injunctive relief to be applied *in futuro*, case is vacated and remanded to Court of Appeals for a determination, in first instance, of whether former dispute is now moot and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against petitioner. Spomer v. Littleton, p. 514.

3. *State courts—Offenses—Necessity for determining federal question.*—State courts should have determined where petitioner's alleged offenses occurred with respect to boundaries of present or former Indian reservation since if they occurred outside those boundaries State Supreme Court unnecessarily reached federal question in deciding that reservation as such had ceased to exist. Satiacum v. Washington, p. 1.

PROFANE LANGUAGE. See **Constitutional Law**, VI, 1.

PROFESSIONAL MANAGEMENT SERVICES. See **Fair Labor Standards Act**, 1–2.

PROFIT-SHARING PLANS. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

PROPERTY RIGHTS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

PROSPECTIVITY. See **Constitutional Law**, III, 3; **Stays**, 4.

PUBLIC CONTRACTS. See **Constitutional Law**, V, 1–2.

PUBLIC SCHOOLS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 6–8.

PUBLIC SCHOOL TEACHERS. See **Constitutional Law**, III, 6–8.

PURCHASER OF BUSINESS. See **Judicial Review**, 2; **National Labor Relations Board**, 1–5.

PUTATIVE EARNINGS. See **National Labor Relations Board**, 1–5.

PUYALLUP RESERVATION. See **Procedure**, 3.

QUASI-JUDICIAL IMMUNITY FROM SUIT. See **Procedure**, 2.

RACIAL DISCRIMINATION. See **Constitutional Law**, I, 1–4; **Injunctions**, 2; **Justiciability**, 1–4; **Procedure**, 2.

"RAIDING" OF POLITICAL PARTY. See **Constitutional Law**, VI, 4.

RAIL PASSENGER SERVICE ACT OF 1970.

Exclusive remedies for breaches—Attorney General—Labor agreements—No private cause of action.—Section 307 (a) of Act—which confers jurisdiction on federal district courts to grant equitable relief on petition of Attorney General or, in a case involving a labor agreement, on petition of any affected employee, including authorized employee representatives, if Amtrak or any railroad acts inconsistently with Act or fails to discharge its responsibilities thereunder—in light of its express language, and legislative history of that provision and of Act as a whole, provides the exclusive remedies for breaches of any duties or obligations imposed by Act, and no additional private cause of action to enforce compliance with Act can properly be inferred. Nat'l RR. Passenger Corp. v. Passengers Assn., p. 453.

RAILROADS. See **Rail Passenger Service Act of 1970.**

REAL ESTATE MANAGEMENT SERVICES. See **Fair Labor Standards Act**, 1–2.

REAL PROPERTY. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

REASONABLE SEARCHES. See **Constitutional Law**, VII, 1–4, 10.

RECHANNELING PROJECTS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

REFUSAL TO TESTIFY. See **Constitutional Law**, V, 1–2.

REGISTERED PHARMACISTS. See **Constitutional Law**, III, 4; **Jurisdiction**, 5.

REGISTERED REPRESENTATIVES. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

REGISTRATION TO VOTE. See **Constitutional Law**, IV.

REGULATIONS. See **Civil Rights Act of 1964**, 2; **Judicial Review**, 3.

REHABILITATION. See **Constitutional Law**, III, 2; VIII, 3; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

REHABILITATIVE COMMITMENT. See **Constitutional Law**, III, 2; **Narcotic Addict Rehabilitation Act of 1966**, 1–4.

REINSTATEMENT. See **Judicial Review**, 2; **National Labor Relations Board**, 1–5.

REMAND. See **Appeals**, 2; **Appointment of Counsel; Procedure**, 1–2.

RENTALS. See **Fair Labor Standards Act**, 1–2.

RENTAL VALUE. See **Jurisdiction**, 2–4.

REOPENING CLASSIFICATIONS. See **Selective Service Regulations.**

REPUBLICAN PRIMARY. See **Abstention; Constitutional Law**, VI, 4.

RESERVATION LANDS. See **Jurisdiction**, 2–4.

RES JUDICATA. See **Admiralty**, 1–2.

RESTORATION OF JUDGMENT. See **Appeals**, 4.

RESTRAINING ORDERS. See **National Labor Relations Board**, 1–5.

RESTRAINTS OF TRADE. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

RESTRAINTS ON COMPETITION. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

RETENTION IN ARMED FORCES. See **Habeas Corpus.**

RETROACTIVITY. See **Constitutional Law**, VIII, 2; **Stays**, 4.

RIGHT OF ASSOCIATION. See **Constitutional Law**, VI, 4–7.

RIGHT OF OCCUPANCY. See **Jurisdiction**, 2–4.

RIGHT TO BEAR CHILDREN. See **Constitutional Law**, III, 6–8.

RIGHT TO COUNSEL. See **Constitutional Law**, VIII, 2.

RIGHT TO POSSESSION. See **Jurisdiction**, 2–4.

RIGHT TO REFRAIN FROM UNION MEMBERSHIP. See **National Labor Relations Act.**

RIPARIAN LANDS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

RIPARIAN RIGHTS.

1. *Abandoned riverbed—Ownership—Federal law governance.*—Ownership of land previously submerged by movement of Colorado River but later abandoned by river as result of federal rechanneling project is governed by federal law. Issue is not what rights State has accorded private owners in lands that State holds as sovereign but how far State's sovereign right extends under equal-footing doctrine and federal Submerged Lands Act, *i. e.*, whether State retains title to lands formerly beneath the Colorado or whether title thereto is defeasible by withdrawal of those waters. Bonelli Cattle Co. v. Arizona, p. 313.

2. *Abandoned riverbed—State's claim—Equal-footing doctrine.*—Equal-footing doctrine does not support State's claim to land previously submerged by movement of Colorado River but later abandoned by river as result of federal rechanneling project, since when water receded from disputed land, there was no longer a public purpose to be served by State, as sovereign, holding title thereto. Bonelli Cattle Co. v. Arizona, p. 313.

3. *Abandoned riverbed—State's claim—Submerged Lands Act.*—Submerged Lands Act, which did not abrogate federal law of accretion, does not support State's claim to land previously submerged by movement of Colorado River but later abandoned by river as result of federal rechanneling project, since that Act does not extend to States any interest in beds of navigable rivers beyond those afforded by equal-footing doctrine. Bonelli Cattle Co. v. Arizona, p. 313.

4. *Abandoned riverbed—Title in riparian owner—Accretion and avulsion doctrines.*—Title to land previously submerged by movement of Colorado River but later abandoned by river as result of federal rechanneling project, under applicable federal common law, is vested in petitioner as riparian landower and not in State as owner of riverbed. Analysis of interests of State and petitioner, in light of rationales for federal common-law doctrines of accretion and avulsion, compels conclusion that, as between State, as owner of riverbed, and petitioner, as riparian owner, surfacing of subject land should be treated as an accretion; hence title to disputed land should be vested in petitioner. Doctrine of avulsion does not apply because of limited interests of State in subject property. Bonelli Cattle Co. v. Arizona, p. 313.

RIVERBEDS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

RULES OF CHICAGO MERCANTILE EXCHANGE. See **Judicial Review**, 1.

RULES OF CIVIL PROCEDURE. See **Appeals**, 3; **Class Actions**, 1–2; **Judicial Review**, 2; **Jurisdiction**, 1; **National Labor Relations Board**, 4; **Statute of Limitations**, 1–3.

RULES OF CRIMINAL PROCEDURE. See **Constitutional Law**, VIII, 1.

RULES OF NEW YORK STOCK EXCHANGE. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

RULES OF SUPREME COURT. See also **Constitutional Law**, III, 1; **Procedure**, 2.

Petition for certiorari—Dispensing with printing—Rules 39, 53.—Motion to dispense with printing petition for certiorari as required by this Court's Rule 39, which motion is supported by only generalized allegations of inability to afford payment of costs of printing (as that term is defined in Rule) but that does not comply with Rule 53 governing *in forma pauperis* proceedings, is disfavored, the Court not being disposed to waive functional standards established by Rule 39. Snider v. All State Administrators, p. 685.

SAFETY DISPUTES. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act.**

SAFETY HAZARDS. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act.**

SALES. See **Constitutional Law**, III, 1; **Fair Labor Standards Act**, 1–2.

SALES SLIPS. See **Criminal Law.**

SAN FRANCISCO. See **Civil Rights Act of 1964**, 2.

SCHEMES TO DEFRAUD. See **Criminal Law.**

SCHOOLS. See **Civil Rights Act of 1964**, 2; **Constitutional Law**, III, 6–8.

SEARCHES AND SEIZURES. See **Constitutional Law**, VII, 1–10; **Grand Juries**, 1–3.

SEARCHES INCIDENT TO ARREST. See **Constitutional Law**, VII, 1–4, 10.

SEAWORTHINESS. See **Admiralty**, 1–2.

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SECURITIES BROKERS. See **Appeals**, 1; **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

SECURITIES EXCHANGE ACT OF 1934. See **Constitutional Law**, II; **Federal-State Relations**, 1–4, 6.

SECURITIES REGULATION. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

SELECTIVE SERVICE REGULATIONS.

Conscientious objector—Refusal to reopen classification—In-service review.—A local draft board's mere refusal to reopen a registrant's classification following claim for conscientious objector status made after issuance of order to report for induction and based on assertion that registrant's conscientious objection to war in any form had crystallized after issuance of order to report, cannot signify more than recognition of lack of power to reopen, and cannot be read as "denial" of claim on merits and thus a bar to in-service review, no matter what board's apparent motivations in refusing to reopen may have been, and notwithstanding expressed or unexpressed indication of board's view of claim. Musser v. United States, p. 31.

SELF-INCRIMINATION. See **Constitutional Law,** V, 1–2.

SELF-REGULATION OF STOCK EXCHANGES. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

SENTENCING PRACTICES. See **Constitutional Law,** I, 1–4; **Injunctions,** 2; **Justiciability,** 1–4.

SEPARATE AND DISTINCT CLAIMS. See **Jurisdiction,** 1.

SERVICEMEN. See **Habeas Corpus.**

SEX CRIMES. See **Constitutional Law,** III, 3.

SHERMAN ACT. See **Appeals,** 1; **Class Actions,** 1; **Statute of Limitations,** 1–3.

SIXTH AMENDMENT. See **Constitutional Law,** VIII.

SLANDEROUS LANGUAGE. See **Constitutional Law,** VI, 1.

SODOMY. See **Constitutional Law,** III, 3.

SOFT DRINK BUSINESS. See **Judicial Review,** 2; **National Labor Relations Board,** 1–5.

SPEEDY TRIAL. See **Constitutional Law,** VIII, 3.

SPORTS FISHERMEN. See **Indians.**

STANDING TO SUE. See **Rail Passenger Service Act of 1970.**

STATE AGENCIES. See **Appeals,** 1; **Class Actions,** 1–2; **Judicial Review,** 3; **Statute of Limitations,** 1–3.

STATE CONTRACTS. See **Constitutional Law,** V, 1–2.

STATE COURTS. See **Procedure,** 3.

STATE CRIMINAL TRIALS. See **Constitutional Law,** VIII, 3.

STATE PRISONERS. See **Constitutional Law**, VIII, 3.

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STATES' RIGHTS. See **Accretion**, 1–3; **Federal-State Relations**, 5; **Riparian Rights**, 1–4.

STATUTE OF LIMITATIONS. See also **Procedure**, 1.

1. *Class action—Suspension of statute—Timely intervention.*—Commencement of class action suspends applicable statute of limitations as to all asserted members of class who would have been parties had requirement of Fed. Rule Civ. Proc. 23 (a) (1) been met, and here where petitioners, who were purported members of class, made timely motions to intervene after District Court had found suit inappropriate for class action status, institution of original class suit tolled limitations statute for petitioners. American Pipe & Construction Co. v. Utah, p. 538.

2. *Class action—Suspension of statute—Timely intervention.*—Commencement of class action suspended running of limitations period only during pendency of motion to strip suit of its class action character. Since class action was filed with 11 days yet to run in period as tolled by § 5 (b) of Clayton Act, intervenors had 11 days after entry of order denying them participation in class suit in which to move to file their intervention motion. Their filing only 8 days after entry of such order was thus timely. American Pipe & Construction Co. v. Utah, p. 538.

3. *Judicial tolling—Substantive right—Antitrust acts.*—A judicial tolling of statute of limitations does not abridge or modify a substantive right afforded by antitrust acts; mere fact that a federal statute providing for substantive liability also sets a time limitation upon institution of suit does not restrict power of federal courts to hold that statute of limitations is tolled under certain circumstances not inconsistent with legislative purpose. American Pipe & Construction Co. v. Utah, p. 538.

STATUTORY CONSTRUCTION. See **Rail Passenger Service Act of 1970.**

STAYS.

1. *Bombing of Cambodia—Injunction.*—Application to vacate stay of Court of Appeals' order staying District Court's permanent injunction prohibiting respondent Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," is denied, as MR. JUSTICE MARSHALL cannot say, in light of complexity and importance of issues posed, that Court of Appeals abused its dis-

STAYS—Continued.

cretion. Highly controversial constitutional question involving other two branches of Government should follow regular appellate procedures on accelerated schedule suggested by Court of Appeals. Holtzman v. Schlesinger (MARSHALL, J., in chambers), p. 1304.

2. *Bombing of Cambodia—Injunction.*—Application for stay of District Court's order enjoining Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," the only order extant in this litigation in view of MR. JUSTICE DOUGLAS' order vacating Court of Appeals' stay of District Court order, *ante*, p. 1316, granted by MR. JUSTICE MARSHALL, pending further order of this Court. Schlesinger v. Holtzman (MARSHALL, J., in chambers), p. 1321.

3. *Bombing of Cambodia—Injunction—Vacation of stay.*—Application to vacate Court of Appeals' order staying District Court's permanent injunction prohibiting respondent Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," denied by MR. JUSTICE MARSHALL, *ante*, p. 1304, is granted, as MR. JUSTICE DOUGLAS believes merits of controversy are substantial and that denial of application would catapult American airmen and Cambodian peasants into death zone. Case is treated as capital case, and stay entered by Court of Appeals is vacated and order of District Court is reinstated. Holtzman v. Schlesinger (DOUGLAS, J., in chambers), p. 1316.

4. *State welfare payments—Inconsistency with HEW regulations.*—Application for stay of mandate and judgment, holding certain procedures of Illinois Department of Public Aid inconsistent with Department of Health, Education, and Welfare regulations, pending this Court's action on writ of certiorari granted June 11, 1973, denied as to those portions of judgment that apply prospectively only and granted as to paragraphs 5 and 6 thereof. If paragraph 5, directing that lump sum payments be made retroactively to welfare applicants, is not stayed, petitioners would likely be unable to recover funds paid out, but respondent recipients would be able, if they prevail, to collect all back payments found to be due. District Judge thought paragraph 6 could be complied with in period of 15 days, and given length of time already consumed by appellate review in this case, addition of two weeks following this Court's decision is not of controlling significance in deciding application for stay. Edelman v. Jordan (REHNQUIST, J., in chambers), p. 1301.

STEELHEAD TROUT. See **Indians.**

STOCK EXCHANGES. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

STOCK OWNERSHIP OF PHARMACY. See **Constitutional Law,** III, 4; **Jurisdiction,** 5.

STORES. See **Constitutional Law,** III, 1, 4.

STRIKES. See **Injunctions,** 1; **Labor,** 1–3; **Labor Management Relations Act.**

STUDENTS OF CHINESE ANCESTRY. See **Civil Rights Act of 1964,** 2.

SUBMERGED LANDS ACT. See **Accretion,** 1–3; **Federal-State Relations,** 5; **Riparian Rights,** 1–4.

SUBSTANTIVE RIGHTS. See **Class Actions,** 1–2; **Statute of Limitations,** 3.

SUBSTITUTION OF PARTIES. See **Procedure,** 2.

SUCCESSORS. See **Judicial Review,** 2; **National Labor Relations Board,** 1–5.

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** VII, 5–9; **Grand Juries,** 1–3.

SUPREMACY CLAUSE. See **Constitutional Law,** II; **Federal-State Relations,** 1–4, 6.

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TRAIN DISCONTINUANCES. See **Rail Passenger Service Act of 1970.**

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TREATIES WITH INDIANS. See **Indians**; **Jurisdiction**, 2–4.

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UNFAIR LABOR PRACTICES. See **Judicial Review**, 2; **National Labor Relations Act**; **National Labor Relations Board**, 1–5.

UNION ELECTIONS. See **National Labor Relations Act.**

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UNIONS. See **Injunctions**, 1; **Labor**, 1–3; **Labor Management Relations Act**; **National Labor Relations Act**; **Rail Passenger Service Act of 1970.**

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WARRANTLESS SEARCHES. See **Constitutional Law**, VII, 1–4, 10.

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WATER POLLUTION. See **Jurisdiction**, 1.

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2. *"Employer."* § 3 (d), Fair Labor Standards Act, 29 U. S. C. § 203 (d). Falk v. Brennan, p. 190.

3. *"Enterprise."* § 3 (r), Fair Labor Standards Act, 29 U. S. C. § 203 (r). Falk v. Brennan, p. 190.

4. *"Final judgment."* 28 U. S. C. § 1257. North Dakota Pharmacy Bd. v. Snyder's Stores, p. 156.

5. *"National origin."* § 703, Civil Rights Act of 1964, 42 U. S. C. § 2000e–2 (a)(1). Espinoza v. Farah Mfg. Co., p. 86.

6. *"Order granting . . . injunction."* 28 U. S. C. § 1253. Schmidt v. Lessard, p. 473.

7. *"Specific in terms," "describe in reasonable detail."* Fed. Rule Civ. Proc. 65 (d). Schmidt v. Lessard, p. 473.

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